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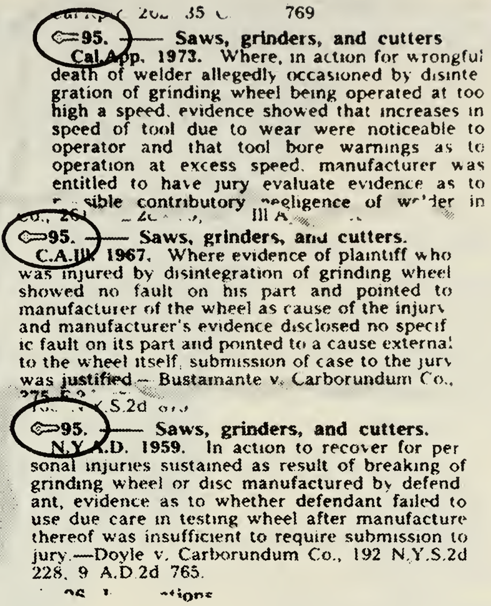

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🔑95. — **Saws, grinders, and cutters**
Cal.App. 1973. Where, in action for wrongful death of welder allegedly occasioned by disintegration of grinding wheel being operated at too high a speed, evidence showed that increases in speed of tool due to wear were noticeable to operator and that tool bore warnings as to operation at excess speed, manufacturer was entitled to have jury evaluate evidence as to [illegible]sible contributory negligence of welder in [illegible]

🔑95. — **Saws, grinders, and cutters.**
C.A.Ill. 1967. Where evidence of plaintiff who was injured by disintegration of grinding wheel showed no fault on his part and pointed to manufacturer of the wheel as cause of the injury and manufacturer's evidence disclosed no specific fault on its part and pointed to a cause external to the wheel itself, submission of case to the jury was justified.—Bustamante v. Carborundum Co., 375 F.2 [illegible] .S.2d [illegible]

🔑95. — **Saws, grinders, and cutters.**
N.Y.A.D. 1959. In action to recover for personal injuries sustained as result of breaking of grinding wheel or disc manufactured by defendant, evidence as to whether defendant failed to use due care in testing wheel after manufacture thereof was insufficient to require submission to jury.—Doyle v. Carborundum Co., 192 N.Y.S.2d 228, 9 A.D.2d 765.

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CIVIL RIGHTS LITIGATION IN THE FIFTH CIRCUIT: PART I

*George Colvin Cochran**

In response to *Alyeska Pipeline Service Co. v. Wilderness Society*,[1] Congress, on October 19, 1976, passed the Civil Rights Attorney's Fees Awards Act of 1976.[2] Assimilated with an already substantial body of legislation authorizing attorneys' fees,[3] the Act covers major enactments

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[1] 421 U.S. 240 (1975) (rejecting the "private attorney general" theory for recovery of attorneys' fees since Congress, not the courts, is to specify when such awards are appropriate). In discussing *Alyeska*, a Senate report concludes:

> This decision and dictum [that the Reconstruction Acts did not contain the necessary congressional authorization] created anomalous gaps in our civil rights laws whereby awards of fees are . . . suddenly unavailable in the most fundamental civil rights cases.

S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976) [hereinafter cited as 1976 S. Rep.].

> [2] [T]he Revised Statutes section 722 (42 U.S.C. 1988) is amended by adding the following: "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981-1983; 1985-1986], title IX of Public Law 92-318 [20 U.S.C. §§ 1681-1686], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Civil Rights Attorney's Fees Awards Act of 1976, Pub. Law No. 94-559, 90 Stat. 2641 (1976) (to be codified in 42 U.S.C. § 1988).

[3] Federal Contested Election Act, 2 U.S.C. § 396 (1970); Freedom of Information Act, 5 *id.* § 552(a)(4)(E) (Supp. V 1975); Privacy Act, *id.* § 552a(g)(3)(B); Federal Employees' Compensation Act Amendments of 1949, *id.* § 8127 (1970); Packers & Stockyards Act, 7 *id.* § 210(f); Perishable Agricultural Commodities Act, *id.* § 499g(b), (c); Agricultural Unfair Trade Practices Act, *id.* § 2305(a), (c); Plant Variety Act, *id.* § 2565; Bankruptcy Act, 11 *id.* § 104(a)(1); Railroad Reorganization Act of 1935, *id.* § 205(c)(12); Corporate Reorganization Act, *id.* §§ 641(3)-(5), 642(3), 643 & 644; Federal Credit Union Act, 12 *id.* § 1786(o); Bank Holding Company Act, *id.* § 1975; Clayton Act, 15 *id.* § 15; Unfair Competition Act, *id.* § 72; Securities Act of 1933, *id.* § 77k(e); Trust Indenture Act, *id.* § 77www(a); Securities Exchange Act of 1934, *id.* §§ 78i(e), 78r(a); Jewelers Hall-Mark Act, *id.* § 298(b)-(d); Truth-in-Lending Act, *id.* § 1640(a)(3) (Supp. V 1975); Fair Credit Reporting Act, *id.* § 1681(n)(3) (1970); Motor Vehicle Information & Cost Savings Act, *id.* §§ 1918(a), 1989(a)(2) (Supp. V 1975); Consumer Product Safety Act, *id.* § 2073; Copyright Act, 17 *id.* § 116 (1970); Organized Crime Control Act of 1970, 18 *id.* § 1964(c); Education Amendments of 1972, 20 *id.* § 1617 (Supp. V 1975); American-Mexican Chamizal Convention Act of 1964, 22 *id.* § 277d-21 (1970); International Claim Settlement Act, *id.* § 1623(f); Federal Tort Claims Act, 28 *id.* § 2678; Norris-LaGuardia Act, 29 *id.* § 107; Fair Labor Standards Act, *id.* § 216(b) (Supp. V 1975); Labor-Management Reporting &

passed by the Reconstruction Congress to redress deprivations of rights guaranteed by the thirteenth and fourteenth amendments—42 U.S.C. §§ 1981, 1982, 1983 and 1985(3).[4] This deceptively concise legislation is accompanied by an extensive legislative history which leaves no doubt that: (1) the eleventh amendment will not preclude an assessment of fees against a state;[5] (2) fees will be awarded as a matter of course to

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Disclosure Act, *id.* §§ 431(c), 501(b) (1970); Employees Retirement Income Act, *id.* § 1132(g) (Supp. V 1975); Longshoremen & Harbor Workers Compensation Act, 33 *id.* §§ 928(a), (b); Water Pollution Prevention & Control Act, *id.* § 1365(d); Ocean Dumping Act, *id.* § 1415(g)(4); Deepwater Ports Act of 1974, *id.* § 1515(d); Patent Infringement Act, 35 *id.* § 285 (1970); Servicemen's Readjustment Act, 38 *id.* § 1822(b) (repealed 1974); Veterans Benefit Act, *id.* § 3404(c) (1970); Safe Drinking Water Act, 42 *id.* § 300j-8(d) (Supp. V 1975); Social Security Act, *id.* § 406(b) (1970); Clean Air Act, *id.* § 1857h-2(d); Voting Rights Act of 1965, *id.* § 1973l(e) (Supp. V 1975); Civil Rights Act of 1964, *id.* §§ 2000a-3(b), 2000e-5(k) (1970); Legal Services Corporation Act, *id.* § 2996(f) (Supp. V 1975); Fair Housing Act of 1968, *id.* § 3612(c) (1970); Noise Control Act of 1972, *id.* § 4911(d) (Supp. V 1975); Railway Labor Act, 45 *id.* § 153(p) (1970); Merchant Marine Act of 1936, 46 *id.* § 1227; Communications Act of 1934, 47 *id.* § 206; Interstate Commerce Act, 49 *id.* §§ 8, 16(2), 908(b), 908(e) & 1017(b)(2). This compilation was derived primarily from information gathered by the Council for Public Interest Law and the Attorney's Fee Project of the Lawyers' Committee for Civil Rights Under Law. *See* H.R. REP. NO. 1558, 94th Cong., 2d Sess. 13-14 (1976) [hereinafter cited as 1976 H.R. REP.]. *See also* Federal Court Attorneys' Fees Act of 1977, H.R. 8221, 95th Cong., 1st Sess. (1977) (proposed legislation awarding attorneys' fees in every case except those invoking diversity jurisdiction). For existing judicial authority for awards in the absence of statutory authorization, see F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 129-30 (1974) (where opponent acts "in bad faith, vexatiously, wantonly or for oppressive reasons"); Hall v. Cole, 412 U.S. 1, 5 (1973) (where successful litigant "confers 'a substantial benefit on the members of an ascertainable class' "), *quoting* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 393-94 (1970); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923) (willful disobedience of court order); Trustees of Improvement Fund v. Greenough, 105 U.S. 527, 530-37 (1882) (fees from common fund awarded as judgment).

[4] See note 2 *supra.*

[5] In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court held that "the Eleventh Amendment and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Id.* at 456. Furthermore, "Congress may, in determining what is 'appropriate legislation' for the purposes of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials." *Id.* Traveling upon the route provided in *Fitzpatrick,* the House Report concludes that "[o]f course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments." 1976 H.R. REP., *supra* note 3, at 7 n.14; *accord,* Rainey v. Jackson State College, 551 F.2d 672, 675 (5th Cir. 1977); Wade v. Mississippi Coop. Extension Serv., 424 F. Supp. 1242, 1254-56 (N.D. Miss. 1976). Although the Act is broadly written, attorneys' fees probably are not available against the United States, its agencies or its officials. *See* 28 U.S.C. § 2412 (1970) (allowing costs in suits to which the United States is a party, but specifically excluding attorneys' fees from the grant); *cf.* 1976 S. REP., *supra* note 1, at 7 (Act will not result in additional expense to the federal government); 1976 H.R. REP., *supra* note 3, at 9 (same). *See generally* M. Trister, Legislative Proposals to Improve Access to Federal Courts and Ad-

prevailing plaintiffs[6] while defendants will receive awards only in exceptional circumstances;[7] (3) statutory violations giving rise to causes of action are within the scope of the Act;[8] (4) traditional computation principles will continue to be utilized in assessing fees under the Act;[9]

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ministrative Agencies 35-36 (Jan. 1977) (submitted to the Research Institute on Legal Assistance of the Legal Services Corporation).

[6] The congressional intent in this respect was to incorporate standards identical to those found in the 1964 Civil Rights Act, 42 U.S.C. § 2000a-3(b) (1970). As interpreted, this section authorizes a grant of attorneys' fees as a matter of course "unless special circumstances would render such an award unjust." Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968). The Senate Report cites *Newman* with approval, 1976 S. Rep., *supra* note 1, at 4, and adds that

> [i]n appropriate circumstances, counsel fees . . . may be awarded pendente lite. Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all the issues. Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.

Id. at 5 (citations omitted). *See also* 1976 H.R. Rep., *supra* note 3, at 7-8.

[7] Both the Senate and House Reports conclude that vexatious or frivolous litigation instituted to "harass or embarrass" the defendant or litigation "motivated by malice and vindictiveness" will justify awarding fees to defense counsel. 1976 H.R. Rep., *supra* note 3, at 7; 1976 S. Rep., *supra* note 1, at 5; *see* Goff v. Texas Instruments Inc., 429 F. Supp. 973, 976 (N.D. Tex. 1977) (attorneys' fees awarded against plaintiff who filed and pursued a "clearly frivolous" claim); *cf.* Harrell v. Joffrion, 73 F.R.D. 267, 268 (W.D. La. 1976) (attorneys' fees assessed personally against plaintiff's attorney who "deliberately and 'vexatiously' " presented a "totally frivolous" diversity case).

[8] 122 Cong. Rec. H12,159 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan discussing Blue v. Craig, 505 F.2d 830 (4th Cir. 1974)). See note 261 *infra.*

[9] The legislative history incorporates standards formulated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). 1976 H.R. Rep., *supra* note 3, at 8; 1976 S. Rep., *supra* note 1, at 6. In reviewing an award of fees unaccompanied by a lower court explanation of the criteria employed to reach the total amount, the *Johnson* court catalogued twelve factors to guide the district courts in formulating awards: (1) time and labor expended; (2) novelty and difficulty of the questions; (3) skill required; (4) preclusion of other employment by acceptance of the case; (5) customary fee for similar work in the community; (6) whether the fee is fixed or contingent (with an award never to exceed that set by contract); (7) time limitations imposed by the client, *i.e.* doing priority work; (8) amount involved and results obtained; (9) experience, reputation and ability of the attorney; (10) the "undesirability" of the case, *e.g.*, future economic consequences due to an adverse impact because of the "unpopularity" of a case; (11) nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d at 717-19. *Johnson* concluded with the admonition that although these factors are not designed "to make the prevailing counsel rich," they must be applied in a manner that will "enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition." *Id.* at 719. Specifically, the compensation granted must be sufficient "to enable an attorney to serve his client effectively and [to] preserve the integrity and independence of the profession." *Id.* at 720. For detailed applications of the *Johnson* formulation, see Rainey v. Jackson State College, 551 F.2d 672, 676-77 (5th Cir. 1977) and Foster v. Boise-Cascade, Inc., 420 F. Supp. 674, 689-95 (S.D. Tex. 1976). *See*

and (5) the Act will be given retroactive application to causes pending at the time of its passage.[10]

Whether one adopts the preferred characterization of the Act as a major step toward protecting basic civil rights[11] or sides with the "Lawyers' Relief Act" philosophy,[12] Congress has undoubtedly provided an additional triggering mechanism in one of the most litigated areas of federal law.[13] With this premise in mind, this article and its successor[14] are designed to develop the working characteristics of the constitu-

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also Panior v. Iberville Parish School Bd., 543 F.2d 1117, 1119-20 & n.6 (5th Cir. 1976) (per curiam) (abuse of discretion to make award without hearing to determine validity of fee submitted); Mims v. Wilson, 514 F.2d 106, 111 (5th Cir. 1975) (trial judge not bound by fee stipulations between counsel).

[10] 1976 H.R. REP., *supra* note 3, at 4 n.6. *See also* Rainey v. Jackson State College, 551 F.2d 672, 676-77 (5th Cir. 1977) (detailing the legislative history on this point); Wade v. Mississippi Coop. Extension Serv., 424 F. Supp. 1242, 1252-53 (N.D. Miss. 1976) (same). *But see* Peacock v. Drew Mun. Separate School Dist., No. GC 73-20-K (N.D. Miss. June 29, 1977) (Act requires retroactive application "only in those cases in which some 'active' issue was pending on the date of its enactment").

[11] *E.g.*, 122 CONG. REC. S16,251 (daily ed. Sept. 21, 1976) (remarks of Senator Scott, noting that the Act would "greatly aid the cause of human rights . . . without an increase in the Federal budget or bureaucracy"); *id.* at S16,491 (remarks of Senator Tunney); 1976 S. REP., *supra* note 1, at 6 (Act permits average citizen to enforce constitutional rights).

[12] CONG. REC. S16,431 (daily ed. Sept. 22, 1976) (remarks of Senator Abourezk). During an extensive filibuster, Senator Allen characterized the Act as a "windfall" for lawyers designed, among other things, to "stir up" litigation. *Id.* at S16,254 (daily ed. Sept. 21, 1976).

[13] There were 10,392 "civil rights" suits filed in 1975. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANN. REP. OF THE DIRECTOR 194 (1975). *See also* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557, 558-59; McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 VA. L. REV. 1, 1 (1974); Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1487 n.12 (1969).

[14] The second installment of this monograph will appear in Volume 49, Number 1 of the *Mississippi Law Journal* and will discuss injunctions and 42 U.S.C. §§ 1981, 1982, 1985(3). Additionally, an overall critique of the current status of the law will be made.

As this monograph reached the galley stage, a significant contribution to the field was published by the *Harvard Law Review*. *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977). Approaching the area with a highly developed legislative and judicial history, portions of the presentation overlap substantive areas discussed herein and give rise to disagreement. *Compare id.* at 1199 (accepting lower court extensions of the immunity doctrine) *with* section II. *B. infra* (concluding that the immunity concept is severely restricted under existing Supreme Court precedent); *Developments in the Law, supra*, at 1204-09 *with* section IV. *B. infra* (differing approaches to correct resolution of the "negligence liability" issue); *Developments in the Law, supra*, at 1267-74 (employing admitted dictum as a clear signal of a change in course with respect to the no-exhaustion rule) *with* note 262 *infra* (noting the recent dismissal of certiorari in Burrell v. McCray, 426 U.S. 471 (1976) (per curiam) which indicates that the rule is alive and well). Finally, one area of clear conflict, though reserved for Part II of this article, is now subject to plenary review by the Fifth Circuit, Leonard v. City of Columbus, 551 F.2d 974, ent causes of action with particular emphasis on the independent precedent established by the nation's largest court of appeals—the Fifth Circuit.[15] The initial installment and a portion of the second detail the positions taken, followed by an analysis of the "law of the circuit" as it relates to congressional intent, policy and the potential for Supreme Court intervention.

I. BACKGROUND: 42 U.S.C. § 1983

In response to a perceived inability or unwillingness by state governments in the South to afford necessary protection for the constitutional rights of all citizens,[16] the 1871 Congress fashioned a private civil

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978 (5th Cir.) (abstention not appropriate in § 1983 cases), *rehearing en banc granted*, No. 75-2344 (5th Cir. July 1, 1977), and warrants at least embryonic footnote treatment.

Specifically, the *Review* presentation accepts at face value the continued viability of Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), as acceptable precedent for the proposition that abstention is appropriate in § 1983 suits, *Developments in the Law*, *supra*, at 1250-54, even though the case was decided 20 years prior to Monroe v. Pape, 365 U.S. 167 (1961), and during a period in which "exhaustion" was an accepted requirement in § 1983 litigation. See note 51 *infra*. Moreover, although referring to secondary authorities as the *only* existing precedent for abandonment of the doctrine in § 1983 litigation, *Developments in the Law*, *supra*, at 1253 n.20, a majority of the Supreme Court recently joined in the following conclusion:

> [T]he dissent's theme of the "paramount concern of avoiding constitutional questions, where possible . . ." strikes a particularly jarring note in a civil rights case . . . . Although we have no occasion to decide the issue here, there is substantial authority for the proposition that abstention is not favored in an equal protection, civil rights case brought as was this one under 42 USC § 1983.

Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 628 (1974) (footnote omitted). Indeed, the Court has time and again made clear that use of the discretionary power to abstain must take into consideration the nature of the controversy and the particular right sought to be enforced. Harman v. Forssenius, 380 U.S. 528, 534-37 (1965) (no abstention in voting case); Baggett v. Bullitt, 377 U.S. 360, 375-80 (1964) (first amendment); Griffin v. County School Bd., 377 U.S. 218, 229 (1964) (school desegregation); Edwards v. Sammons, 437 F.2d 1240, 1243 (5th Cir. 1971) (cases involving "imperative rights" are not proper for abstention). Existing judicial precedent is therefore sufficient to establish the minimal point that *Pullman* and its progeny cannot be accepted at face value for the proposition that the general rules governing abstention are fully applicable to § 1983 cases.

[15] In the first half of fiscal year 1976, a total of 873 "civil rights" suits were filed in the United States District Courts. Of this figure, 209 cases—almost one quarter of the total—were filed in the Fifth Circuit. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, SEMI-ANN. REP. OF THE DIRECTOR 72 (1976). In addition, of the 1,762 civil rights cases pending in the district courts on December 31, 1975, 411 were pending in the Fifth Circuit. *Id.* at 76.

[16] This legislation

> not only provides a civil remedy for persons whose former condition may have

remedy enforceable through the federal judicial system.[17] This legislation, now codified as 42 U.S.C. § 1983, was one of a series of five civil rights acts passed between 1866 and 1875, a period of intense legislative activity in response to ratification of the thirteenth, fourteenth and fifteenth amendments.[18] Tracking the language of the fourteenth amendment[19] and incorporating its sanctions against state-supported

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> been that of slaves, but also to *all people* where, under color of State law, they or any of them, may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.

CONG. GLOBE, 42d Cong., 1st Sess. 68 (1871) (remarks of Representative Shellabarger) (emphasis added).

> [17] It is abundantly clear that one reason the legislation was passed was to *afford a federal right in federal courts* because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Monroe v. Pape, 365 U.S. 167, 180 (1961) (emphasis added). *But see* Aldinger v. Howard, 427 U.S. 1, 15, 18 (1976), where the Court implied that § 1983 suits may also be brought in state courts. Although dissenting from the majority's holding, Mr. Justice Brennan noted:

> The Court today appears to decide *sub silentio* a hitherto unresolved question by implying that § 1983 claims are not claims exclusively cognizable in federal court but may also be entertained by state courts . . . . This is a conclusion with which I agree.

Id. at 36 n.17 (Brennan, J., dissenting); *cf.* Jones v. Hildebrandt, 550 P.2d 339, 342-45 (Colo. 1976) (en banc) (§ 1983 suit brought in state court), *petition for cert. dismissed as improvidently granted*, 97 S. Ct. 2283 (1977) (per curiam); Terry v. Kolski, 254 N.W.2d 704, 711 (Wis. 1977) (citing state court decisions in accord with the proposition).

[18] Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. §§ 1983, 1985 (1970)); Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144 (codified at 42 U.S.C. § 1988 (1970)); Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144 (codified at 42 U.S.C. § 1988 (1970)); Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27 (codified at 42 U.S.C. § 1988 (1970)); Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. § 1982 (1970)). Gene Gressman described the legislative results of these enactments as having exceeded "the immediate problems created by the emancipation of the Negro and [having] caused a most profound shift in the status of the federal government relative to the civil rights" of all persons. Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1323 (1952).

For detailed judicial commentaries on the legislative history of these acts, *see, e.g.*, Mitchum v. Foster, 407 U.S. 225, 238-43 (1972) (§ 1983); Lynch v. Household Fin. Corp., 405 U.S. 538, 543-46 (1972) (same); Griffin v. Breckenridge, 403 U.S. 88, 96-103 (1971) (§ 1985(3)), Adickes v. S.H. Kress Co., 398 U.S. 144, 162-69 (1970) (§ 1983); Sullivan v. Little Hunting Park, 396 U.S. 229, 235-39 (1969) (§ 1982); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422-37 (1968) (same); Monroe v. Pape, 365 U.S. 167, 172-87, 212-59 (1961) (§1983). *See also* Gressman, *supra*, at 1325-36; Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 132-36 (1972); Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 279-82 (1965); Comment, *Federal Comity, Official Immunity, and the Dilemma of Section 1983*, 1967 DUKE L.J. 741, 743-48.

[19] Leaving no doubt to its intent, Congress titled its product "An Act to Enforce

action antithetical to the rights guaranteed,[20] Congress minced no legislative words in providing a remedy for deprivation of these rights.[21] As presently codified:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[22]

Ensuring unfettered access to a federal forum, the jurisdictional provision of this legislation excluded reference to an amount in controversy requirement.[23]

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the Fourteenth Amendment." Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1970)). The amendment provides in pertinent part:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV.

[20] The Supreme Court has construed § 5 to prohibit state action in any form, whether executive, legislative or judicial, which denies any person equal protection of the law. *Ex parte* Virginia, 100 U.S. 339, 346-47 (1880). The judicially-perceived requirement of "state action" is now firmly embodied in § 1983. See section III. *infra.*

[21] As described by one commentator, the statute "is notable for the absence of qualification or limitation." Note, *supra* note 13, at 1486. *But cf.* Stefanelli v. Minard, 342 U.S. 117, 121 (1951) ("loosely and blindly drafted").

[22] 42 U.S.C. § 1983 (1970).

[23] The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

28 U.S.C. § 1343(3) (1970). These two sections—one substantive, the other jurisdictional—were initially part of a single act, the Civil Rights Act of 1871. See note 18 *supra.* In 1875, however, the Act was separated into what are now § 1983 and § 1343(3). Rev. Stat. §§ 563(12), 629(16), 1979 (2d ed. 1878). *See* Herzer, *Federal Jurisdiction Over Statutorily-Based Welfare Claims*, 6 Harv. C.R.-C.L.L. Rev. 1, 5-9 (1970). In addition, the language of § 1343(3) was amended to confer jurisdiction in causes arising under laws "providing for equal rights" rather than simply laws of the United States.

[I]n the process of codification and reorganization of sections 1983 and 1343(3), Heated debates generated during passage of the legislation highlighted both the fears of opponents and the uncompromising posture assumed by the majority. Those opposed expressed, among other things, two distinct reservations. First, it was suggested that the phrase "every person" would encompass and therefore subject to liability all state officials, regardless of the position occupied.[24] Further, the skeptics argued that the legislation would alter federal-state relations by vesting "control" of internal, domestic matters in the federal judiciary.[25]

> no clear congressional intent that the scope [of §] 1343(3) should be narrower than the reach of section 1983 ever appeared. The crucial "equal rights" language did not appear until the general revision of 1875, which made no substantive changes in the Act of 1871 but merely separated its substantive and jurisdictional provisions. Since the phrase was placed in a jurisdictional subsection, the equal rights language appears to have been employed solely to refer to the estranged substantive sections of the Ku Klux Klan Act [§ 1983] rather [than] to limit the scope of the substantive provisions. Because the fourteenth amendment was originally intended to secure "equal rights" to emancipated blacks, it is understandable that the revisors would use this wording to refer to the displaced substantive provisions which had been enacted to enforce the amendment. It seems illogical to infer from this history that Congress intended to limit substantially the scope of section 1983 by restricting its jurisdictional counterpart, section 1343(3), or to create causes of action under section 1983 for which it excluded jurisdiction under section 1343(3). Instead of constricting the operation of section 1343(3), the equal rights phrase should be interpreted to refer this jurisdictional section back to its substantive and coextensive partner. Since section 1983 has been expanded well beyond equal rights cases, the scope of section 1343(3) should be similarly extended.

Id. at 7-8 (footnotes omitted).

In Lynch v. Household Fin. Corp., 405 U.S. 538 (1972), the Court tracked the history of the 1875 division and concluded that "[d]espite the different wording of the substantive and jurisdictional provisions, when the § 1983 claim alleges constitutional violations, § 1343(3) provides jurisdiction and both sections are construed identically." *Id.* at 543 n.7. For the effect of the alteration on statutory claims, see note 261 *infra*.

[24] For example, Congressman Arthur remarked that:

> Under the provisions of this section every judge in the State court and every other officer thereof, great or small, will enter upon and pursue the call of official duty with the sword of Damocles suspended over him by a silken thread, and bent upon him the scowl of unbridled power, the forerunner of the impending wrath, which is gathering itself to burst upon its victim.

CONG. GLOBE, 42d Cong., 1st Sess. 366 (1871); *see id.* app. at 217 (remarks of Senator Thurman) (asserting that the statute's reach would be boundless).

[25] Senator Bayard protested against

> any interpretation of this fourteenth amendment as shall in effect change the relations of the Federal Government to the States, and deprive the States by the action of this Government of the control of their domestic affairs, which no one ever doubted they had, which was not given into the hands of the Federal Government.

Id. at 243. *See also* CONG. GLOBE, 42d Cong., 1st Sess. 366 (1871) (remarks of Congressman Arthur) (it "absorbs the entire jurisdiction of the States over their local and domestic

These fears reflected an implicit distaste for granting access to the federal system and the consequences of what was perceived to be an "open ended" grant of power.[26] For instance, one formidable opponent of the legislation cautioned:

> "[Every] person" who [deprives another] "of any rights, privileges, or immunities secured by the Constitution . . . ." What is meant by [this]? . . . I take it that if that is to be left to judicial decisions, as it is here entirely, without any definition on our part, there may be almost as many decisions as there are judges of the Federal courts; and it will be a long time before [these questions are resolved].[27]

The remark proved prophetic, and, as will become clear, the "every person" portion proved to be but one of many troublesome sources of intense definitional concern by the federal judiciary.

During its first ninety years of existence, only a limited number of

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affairs"); *id.* at 429 (remarks of Congressman McHenry) (Congress without power to enforce); *id.* app. at 216 (remarks of Senator Thurman) ("a disparagement of the State courts"). The most articulate statement in this context was made by Congressman Slater:

> [W]e are invited to enter upon a new domain in legislation, involving the concentration of all powers in a centralized Government and in one man's hands, overriding in one enactment all the barriers erected by the fathers to protect the State against encroachments upon their local jurisdictions over domestic affairs, which they made the chief corner-stone of our system of government.

Id. at 304.

[26] Indeed, comments such as the following were not at all uncommon:

> [Section 1983] authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution . . . to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States.

Id. at 216 (remarks of Senator Thurman). Reflecting the century-old concern, one recent commentator concludes that the legislative decision not to place any dollar limitation on the cause of action has resulted in cases that are "trivial, often involving few persons, minor deprivations, and small sums." Note, *supra* note 13, at 1493; *see* Carter v. Estelle, 519 F.2d 1136, 1136-37 (5th Cir. 1975) (per curiam) (§ 1983 suit alleging "wrongful takings" of inexpensive personal property by detention authorities); Watson v. Stynchombe, 504 F.2d 393, 393-94 (5th Cir. 1974) (per curiam) (same); Montana v. Harrelson, 469 F.2d 1091, 1091-92 (5th Cir. 1972) (per curiam) (same). *But see* Nickens v. White, 536 F.2d 802, 803 (8th Cir. 1976) (per curiam) (de minimis takings not cognizable). For an articulate response to this issue and others raised by the section's detractors, see Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352 (1970).

[27] CONG. GLOBE, 42d Cong., 1st Sess. app. 216 (1871) (remarks of Senator Thurmond).

cases were decided under the section.[28] During this "formative" period, however, the Court set forth certain, now basic, interpretations. First, section 1983 was to be directed only against "state action" as opposed to acts of "private individuals."[29] Second, in construing the criminal counterpart of section 1983,[30] the phrase "under color of" was interpreted in *United States v. Classic*[31] to include the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer [was] clothed with the authority of state law."[32] As such, the phrase encompasses both authorized and unauthorized acts by "officers who undertake to perform their official duties."[33] Finally, implicitly rejecting a lower court decision that the "every person" provision was not subject to exception,[34] the Court in *Tenney v.*

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[28] *See* Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951) (concluding that only 21 cases were filed during the first 50 years of the statute's existence). In 1955, however, the *Harvard Law Review* characterized judicial activity between 1944 and 1954 as a "multitude of cases," to wit: 1944 (21 cases), 1945 (29), 1946 (40), 1947 (52), 1948 (116), 1949 (117), 1950 (142), 1951 (126), 1952 (166), 1953 (126), 1954 (162). 68 HARV. L. REV. 1229, 1229 n.1 (1955). *See also* 46 COLUM. L. REV. 614, 614 (1946) ("until recent years, almost moribund"). These figures can profitably be compared with current data. See notes 13 & 15 *supra.*

[29] The Civil Rights Cases, 109 U.S. 3, 10-11 (1883); United States v. Cruikshank, 92 U.S. 542, 554-55 (1875).

[30]
> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both . . . .

18 U.S.C. § 242 (1970).

[31] 313 U.S. 299 (1941).

[32] *Id.* at 326. *See also* Snowden v. Hughes, 321 U.S. 1, 5-13 (1944) (implying that state officials who infringe federal rights while violating state laws are potentially liable under § 1983).

[33] Screws v. United States, 325 U.S. 91, 111 (1945) (criminal liability imposed on three police officers who blackjacked a prisoner to death).

[34] Picking v. Pennsylvania R.R., 151 F.2d 240 (3d Cir. 1945), *cert. denied,* 332 U.S. 776 (1947). The case involved a damage suit against a governor and a judge alleging certain due process violations in connection with the plaintiff's extradition from Pennsylvania to New York. Rejecting immunity as a defense, the court stated that "Congress gave a right of action sounding in tort to *every individual* whose federal rights [are] trespassed upon by *any officer*." 151 F.2d at 249 (emphasis added).

In an angered response to this rationale, Judge Learned Hand argued:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints [under § 1983] to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the

Brandhove[35] held that section 1983 did not totally abrogate common law immunities.[36]

In this time frame, the Court also rendered the first major pronouncement indicating judicial adherence to what Congress considered the broad remedial purposes of the 1871 legislation.[37] In *Hague v.*

> innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. . . . In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950). The Hand analysis is obviously suspect, reflecting as it does the legislative considerations rejected during the debates on § 1983. See notes 24 through 27 and accompanying text *supra*. It does stand, however, as perhaps the most articulate attack on those judicial interpretations which "expand" the statute's coverage in accord with legislative intent.

[35] 341 U.S. 367 (1951).

[36] The case involved a § 1983 damage suit against members of a California legislative committee. *Id.* at 370-71. In reversing a lower court decision which had cited *Picking*, see note 34 *supra*, the Court held that § 1983 did not abrogate the common law defense of legislative immunity. *Id.* at 376.

[37] See notes 16 through 18 *supra*. These purposes were clearly explained by Congressman Wilson.

> By the fifth section of the fourteenth article Congress has power to enforce the provisions of the article by appropriate legislation. Now, I ask, what legislation could be more appropriate than to give to a person injured by another under color of . . . State laws a remedy by civil action? What provision of the Constitution is violated thereby? It will be sought for in vain. Gentlemen are forced to concede that there are certain rights, privileges, and immunities inhering in the citizen by virtue of the Constitution. These rights, privileges, and immunities Congress may enforce by legislation; and it is proposed to enforce them by this bill, by the mild remedy of a civil action; *and that is all there is of it.*

Cong. Globe, 42d Cong., 1st Sess., 482 (1871) (emphasis added).

It was during the initial 90-year period that the statute received its most limited construction. *See, e.g.,* Monroe v. Pape, 272 F.2d 365 (7th Cir. 1959) (no remedy where common law tort action available), *rev'd,* 365 U.S. 167 (1961); Hoffman v. Halden, 268 F.2d 280, 300 (9th Cir. 1959) (immunity for all discretionary acts); Simmons v. Whitaker, 252 F.2d 224, 229-31 (5th Cir. 1958) (no state action in debt collection procedure used by sheriff); Brawner v. Irwin, 169 F. 964, 968 (C.C.N.D. Ga. 1909) (only "state rights" involved where sheriff whipped and arrested plaintiff without bringing charges). *See also* Shapo, *supra* note 18, at 310 n.166 (compilation of state officials awarded immunity during the period); Comment, *supra* note 18, at 761 ("doctrine of immunity was expanded to officials ranging from governors to plumbing inspectors"); 68 Harv. L. Rev. 1229, 1229-34 (1955) (questioning broad grants of immunity to entire classes of officials). Indeed, it was within this time frame that Gene Gressman wrote: "Seldom, if ever, have the power and the purposes of legislation been rendered so impotent." Gressman, *supra* note 18, at

CIO,[38] an injunction was sought against city officials who, acting pursuant to a city ordinance, prohibited union leaders from carrying out organizational functions.[39] Concurring with the Court's holding that a cause of action was stated under section 1983,[40] Mr. Justice Stone announced now familiar principles governing the protection of constitutional rights from state action.

> It will be observed that the cause of action, given by the section in its original as well as its final form, extends broadly to deprivation by state action of the rights, privileges and immunities secured to persons by the Constitution.[[41]] It thus includes the Fourteenth Amendment and such privileges and immunities as are secured by the due process and equal protection clauses, as well as by the privileges and immunities clause of that Amendment. It will also be observed that they are those rights secured to persons, whether citizens of the United States or not, to whom the Amendment in terms extends the benefit of the due process and equal protection clauses.[42]

Ninety years after its passage, the full thrust of this controversial legislation became a reality. In *Monroe v. Pape*,[43] Chicago police officers broke into and ransacked a black family's home, forcing the family members to stand naked in the living room.[44] Mr. Monroe was taken to police headquarters, detained for ten hours on "open" charges and subsequently released without being charged.[45] Alleging that the officers had proceeded without either an arrest or a search warrant, the Monroes instituted a section 1983 suit for damages.[46] In a wide-ranging opinion, Mr. Justice Douglas reversed the lower court's decision[47] that no cause of action existed and surveyed the parameters of section 1983 liability in terms of the underlying congressional purposes, *i.e.* overriding cer-

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1323. Similarly, Judge Rives noted that "all the language which can be found that tends to restrict the operation of [§ 1983] comes from the cases and not from the statutes." Whittington v. Johnston, 201 F.2d 810, 813 (5th Cir.) (Rives, J., dissenting), *cert. denied*, 346 U.S. 867 (1953). See note 51 *infra* (detailing the perceived exhaustion requirement).

[38] 307 U.S. 496 (1939).

[39] *Id.* at 505.

[40] *Id.* at 525.

[41] *Compare* Duncan v. Louisiana, 391 U.S. 145, 161-71 (1968) (Black, J., concurring) (detailing incorporation of provisions of the Bill of Rights) *with* note 261 *infra*.

[42] 307 U.S. at 526 (Stone, J., concurring).

[43] 365 U.S. 167 (1961), *rev'g* 272 F.2d 365 (7th Cir. 1959).

[44] 365 U.S. at 169.

[45] *Id.*

[46] *Id.*

[47] Although sympathetic to the Monroes' claim, Chief Judge Hastings of the Seventh Circuit felt nevertheless bound by existing circuit precedent. 272 F.2d at 366, *citing* Stift v. Lynch, 267 F.2d 237, 240 (7th Cir. 1959).

tain types of state laws,[48] providing a remedy where state law is inadequate[49] or when state statutory protection, although theoretically adequate, is not available in practice.[50] With respect to existing state remedies and access to the federal system:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.[51]

Analogizing previous constructions given section 1983's criminal counterpart,[52] the opinion concluded that a "misuse of power," *i.e.* engaging in activity not authorized by state law and made possible solely because the wrongdoer "is clothed with the authority of the state," satisfied the "under color of" state law prerequisite.[53] Finally, the standard of liability under the statute was to be determined "against the background of tort liability that makes a man responsible for the natural consequences of his action."[54]

Monroe signaled the emergence of section 1983 as an effective civil remedy for violations of constitutional rights.[55] In the interim sixteen years, however, the section has become the subject of myriad judicial interpretations which have turned a clear cause of action into a rather complex area of the law.[56] Nevertheless, refinement of the sweeping approach taken by Mr. Justice Douglas easily compensates for remaining deficiencies. Indeed, Mr. Justice Frankfurter's attack on *Monroe* as "denuded of illuminating concreteness"[57] is today a remnant of the past.

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[48] 365 U.S. at 173. *But see* CONG. GLOBE, 42d Cong., 1st Sess. app. 268 (1871), wherein Representative Sloss expressed his opposition in the following manner:

> The first section of this bill prohibits any invidious legislation by States against the rights or privileges of citizens of the United States. The object of this section is not very clear, as it is not pretended by its advocates on this floor that any State has passed any laws endangering the rights or privileges of the colored people.

[49] 365 U.S. at 173; *see* CONG. GLOBE, 42d Cong., 1st Sess. 345 (Senator Sherman discussing the inability of blacks to testify in state courts).

[50] 365 U.S. at 174-77 (detailing congressional findings with respect to southern states which either through lack of power or inclination failed to protect their citizens against Ku Klux Klan activity).

[51] *Id.* at 183. This portion of the opinion reversed significant precedent developed by the circuits that § 1983 incorporated an exhaustion requirement. *E.g.*, Carson v. Board of Educ., 227 F.2d 789, 790-91 (4th Cir. 1955) (per curiam), *cert. denied*, 353 U.S. 910 (1957); Davis v. Arn, 199 F.2d 424, 425 (5th Cir. 1952). Prior to *Monroe*, the House Committee on the Judiciary advocated abandonment of the exhaustion rule in order to "solve the problem where subterfuge and subtleties are resorted to on the administrative level so as to deprive an individual of his rights." H.R. REP. No. 291, 85th Cong., 1st Sess. 11 (1957).

[52] See notes 30 through 32 and accompanying text *supra*.

[53] 365 U.S. at 184, *quoting* United States v. Classic, 313 U.S. 299, 326 (1941).

[54] *Id.* at 187.

[55] The decision survived much adverse criticism by its opponents who, surprisingly enough, attacked the opinion and its ramifications in much the same manner as the section's legislative opponents did in 1871. *Compare* notes 16, 17, 24 through 27 & 48 through 50 *supra with* Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889, 907 (1965) (deters "proper" police conduct); Shapo, *supra* note 18, at 324 (upset "balance" in federal-state relationships);

II. THE "PERSON" REQUIREMENT

A. Governmental Entities

Congress specified that "every person"[58] is potentially subject to liability under section 1983. Literally interpreting this language,[59] the plaintiffs in *Monroe* named as defendants the individual police officers[60]

Note, *supra* note 13, at 1493 (frivolous actions in state court) *and* Comment, *Tort Liability of Law Enforcement Officers Under Section 1983 of the Civil Rights Act*, 30 LA. L. REV. 100, 114-15 (1969) (inability of police to carry out "lawful function").

[56] *E.g.*, Muzquiz v. City of San Antonio, 528 F.2d 499 (5th Cir. 1976) (en banc), *petition for cert. filed,* 45 U.S.L.W. 3057 (U.S. July 27, 1976) (No. 75-1723).

[57] 365 U.S. at 202 (Frankfurter, J., dissenting).

[58] See text accompanying note 22 *supra.*

[59] See Picking v. Pennsylvania R.R., 151 F.2d 240, 250-52 (3d Cir. 1945), *cert. denied,* 332 U.S. 776 (1947), discussed at note 34 *supra.*

[60] The Court accepted without question the propriety of naming as defendants the individual police officers alleged to be directly responsible for depriving the Monroes of their constitutional rights. *Id.* at 172. With limited exceptions, see section II. *B.* & *C. infra,* a § 1983 suit is properly filed against individual state officers either in their official or individual capacities. *See* Ingraham v. Wright, 97 S. Ct. 1401, 1403-04 (1977) (school superintendent); City of Charlotte v. Firefighters Local 660, 426 U.S. 283, 284 n.1 (1976) (city council members); O'Connor v. Donaldson, 422 U.S. 563, 577 (1975) (hospital superintendent); Wood v. Strickland, 420 U.S. 308, 322 (1975) (school board members); Scheuer v. Rhodes, 416 U.S. 232, 238 (1974) (governor, adjutant general of national guard, guard officers and enlisted men, university president); Rinaldi v. Yeager, 384 U.S. 305, 307 n.2 (1966) (prison warden); Davis v. Mann, 377 U.S. 678, 680 (1964) (election officials); Wesberry v. Sanders, 376 U.S. 1, 3 (1964) (governor, secretary of state). The naming of state officers is a "nonissue" in the Fifth Circuit. *See* Cason v. City of Jacksonville, 497 F.2d 949, 951 (5th Cir. 1974) ("individual city officials are persons within § 1983 and may properly be named as defendants"); Sterzing v. Fort Bend Independent School Dist., 496 F.2d 92, 93 n.2 (5th Cir. 1974) (per curiam) ("of course, the appropriately named school officials are persons within § 1983"); United Farmworkers v. City of Delray Beach, 493 F.2d 799, 802 (5th Cir. 1974) ("the individually named city council members and other named individual defendants [director of county planning agency and director of state department of pollution control] are clearly proper persons under . . . § 1983"). *But cf.* Stapp v. Avoyelles Parish School Bd., 545 F.2d 527, 531 n.7 (5th Cir. 1977) (discussing whether members of school board are amenable to suit); Muzquiz v. City of San Antonio, 528 F.2d 499, 500-01 (5th Cir. 1976) (en banc) (members of pension fund board not amenable to suit), *petition for cert. filed,* 45 U.S.L.W. 3057 (U.S. July 27, 1976) (No. 75-1723). See notes 81 through 85 and accompanying text *infra.*

involved and the city of Chicago, thereby drawing into focus the propriety of a cause of action against a municipal entity. In resolving this question, the Court resorted to the legislative history of section 1983 and, more specifically, the "Sherman Amendment," making " 'the county, city or parish' . . . liable 'to pay full compensation' to the person damaged."[61] Although passed by the Senate, it encountered stiff opposition in the House of Representatives and was ultimately rejected. As explained by the Chairman of the Conference Committee:

> We informed the conferees on the part of the Senate that the House had taken a stand on that subject and would not recede from it; that that section imposing liability upon towns and counties must go out or we should fail to agree.[62]

Finding this portion of the debates conclusive, the Court held that the city could not be a named defendant.[63]

Twelve years later, in a suit seeking injunctive relief against a municipality, the Court applied the *Monroe* principle to suits in equity.[64]

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[61] 365 U.S. at 188, *citing* CONG. GLOBE, 42d Cong., 1st Sess. 663 (1871).

[62] CONG. GLOBE, 42d Cong., 1st Sess. 800-01 (1871) (remarks of Congressman Poland).

[63] 365 U.S. at 191. The Court's conclusion received substantial criticism directed to the point that the "Dictionary Act," Act of Feb. 25, 1871, ch. 71, 16 Stat. 431, was passed two months prior to the enactment of § 1983. It provided "that the word 'person' may extend and be applied to bodies politic and corporate." Although describing the act as an instance where "Congress supplies its own dictionary," 365 U.S. at 190 n.47, the Court rejected its applicability by pointing out that it was not of a "mandatory nature. *Id.* at 191. Critics, however, argue that the limited time span between passage of each act indicates a strong congressional desire to encompass municipalities within the meaning of the word "person." *E.g.*, Kates & Kouba, *supra* note 18, at 134-36; Note, *Developing Governmental Liability Under 42 U.S.C. § 1983,* 55 MINN. L. REV. 1201, 1205-07 (1971).

Also noteworthy in the exclusion of municipalities by the *Monroe* Court was its rejection of an argument against a "limited" reading of the legislative history in light of strong policy considerations favoring municipal liability. A two-fold argument was advanced: (1) a damage remedy against lower echelon and often impecunious state officers is ineffective, and (2) an imputation of liability to municipalities would result in steps being taken to limit employee abuse of constitutional rights. See 365 U.S. at 191. Identical arguments are now advanced in advocating that the alternative basis of jurisdiction provided by 28 U.S.C. § 1331 (1970) (amended 1976), see note 86 *infra,* should be utilized to reach the "deep pocket" of the municipal employer. *See, e.g.* Note, *Damage Remedies Against Municipalities for Constitutional Violations,* 89 HARV. L. REV. 922, 927 (1976). For a brief review of the current status of this approach, see note 295 *infra.*

[64] City of Kenosha v. Bruno, 412 U.S. 507 (1973). The Court, per Mr. Justice Rehnquist, concluded:

> We find nothing in the legislative history . . . or in the language actually used by Congress, to suggest that the generic word "person" in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them.

Id. at 513. In the interim between *Monroe* and *Kenosha*, the Fifth Circuit adopted the

Other than extending the basic holding to counties,[65] however, it has not felt compelled to further delineate any additional local governmental units which fall beyond the parameters of the "person" definition.[66]

A major Fifth Circuit decision interpreting this limited precedent uses language indicating that all governmental entities are excludable. In *Adkins v. Duval County School Board*,[67] a case seeking injunctive relief against a school board, Judge Roney concluded:

> [Supreme Court] precedents dealt specifically with political subdivisions of a state, *i.e.*, municipalities and counties. If the subdivisions of

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position that in light of expressed congressional concern that a muncipality's "courthouse, its jails, its poorhouses, its hospitals [and] its schools would be sold to satisfy judgments," CONG. GLOBE, 42d Cong., 1st Sess. 763 (1871) (remarks of Senator Casserly), the *Monroe* holding did not apply to suits in equity. Harkless v. Sweeny Independent School Dist., 427 F.2d 319, 322-23 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); *accord*, Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*; *supra* note 63, at 1212-13 (approving the circuit position).

[65] Moor v. County of Alameda, 411 U.S. 693, 707-10 (1973). In a wide-ranging opinion, the Court held that by consenting to be sued in state court a county does not waive its immunity from suit in federal court under the "person" requirement. *Id.* at 707. In reaching this conclusion, the opinion reiterates the expressed congressional desire for nonliability and concludes that this limitation cannot be circumvented by proceeding through 42 U.S.C. § 1988 (1970). *Id.* at 710. See note 262 *infra*. The *Moor* approach was later expanded in a decision holding that the concept of pendent jurisdiction sanctioned in United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966), may not be employed to join a county defendant as a "pendent party" in a proceeding where a § 1983 action is properly brought against individual state officers. Aldinger v. Howard, 427 U.S. 1, 5-16 (1976).

[66] In Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974), suit was brought against, *inter alia*, a "nominating panel" which assisted the mayor in appointing members of the school board. *Id.* at 607. Although the lower court held that the panel was not a "person" under § 1983, the Supreme Court refused to consider the issue. *Id.* at 612 n.11. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 97 S. Ct. 568 (1977), presented the issue of whether a school board is a "person" or is "sufficiently like [a] municipal [corporation] so that it, too, is excluded from § 1983 liability." *Id.* at 571. The Court, per Mr. Justice Rehnquist, assumed jurisdiction under 28 U.S.C. § 1331 (1970), and concluded that "[t]he related question of whether a school district is a person for purposes of § 1983 is [therefore] not before us." *Id.* at 572; *see* Monell v. Department of Social Servs., 532 F.2d 259, 262-64 (2d Cir. 1976), *cert. granted*, 97 S. Ct. 807 (1977) (issue of whether school board is a "person").

Other decisions, however, do make it clear that the "nonperson" exclusion is applicable only to governmental entities as contrasted to those in the private, corporate sector. *E.g.*, Lynch v. Household Fin. Corp., 405 U.S. 538, 539-40 (1972) (unsecured creditor); Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (variety store). For Fifth Circuit holdings to the same effect, see Golden v. Biscayne Bay Yacht Club, 530 F.2d 16, 22 (5th Cir.) (private yacht club), *cert. denied*, 429 U.S. 872 (1976); Smith v. Brookshire Bros., Inc., 519 F.2d 93, 94 (5th Cir. 1975) (per curiam) (retail grocer), *cert. denied*, 424 U.S. 915 (1976); Fulton v. Emerson Elec. Co., 420 F.2d 527, 530 (5th Cir. 1969) (per curiam) (corporate employer), *cert. denied*, 398 U.S. 903 (1970). With respect to circumstances giving rise to a cause of action against presumably private entities, see section III. *infra*.

[67] 511 F.2d 690 (5th Cir. 1975).

> a state were not "persons" under § 1983, the state itself was obviously not such a "person" and therefore, the entities through which the state functions should be excluded.[68]

Consistent with the *Adkins* approach, there is no decision in the circuit finding *any* governmental unit a "person" for purposes of section 1983.[69] Exactly what are entities "through which the state functions," however, has been a source of division.

In *Muzquiz v. City of San Antonio*,[70] firemen and policemen brought suit against a city's "Pension Fund Board of Trustees"[71] contesting the constitutionality of a no-refund provision for amounts obligatorily contributed. Of immediate concern was the question of whether the board was a "person" for purposes of section 1983. Sitting en banc, the court rejected a panel decision that the entity performed "an essentially private function"[72] as opposed to one acting "in the nature of a municipality"[73] and was, therefore, a "person" under section 1983.[74] Although other circuits were cited as being in accord with the proposition that public entities performing governmental functions were excludable,[75] the governmental-functions characteristic was not viewed as the sole ground for exclusion.

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[68] *Id.* at 693. The plaintiff had argued that since previous Supreme Court cases granted equitable relief against school boards, such entities are within the § 1983 definition of a "person." *Id.* at 694; *e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 650-51 (1974) (challenge to mandatory maternity leave for teachers). This argument was rejected on the grounds that pre-*Kenosha* decisions have no precedential value, see note 64 *supra*, and that in two post-*Kenosha* cases, *LaFleur* and Cohen v. Chesterfield County School Bd., 414 U.S. 632 (1974), individual school board members were also named defendants. 511 F.2d at 694-96.

[69] Vick v. Texas Employment Comm'n, 514 F.2d 734, 737 (5th Cir. 1975) (state employment commission); Hamilton v. Chaffin, 506 F.2d 904, 913 (5th Cir. 1975) (city); Burton v. Waller, 502 F.2d 1261, 1273 (5th Cir. 1974) (same), *cert. denied*, 420 U.S. 964 (1975); Cason v. City of Jacksonville, 497 F.2d 949, 952-53 (5th Cir. 1974) (same); United Farmworkers v. City of Delray Beach, 493 F.2d 799, 801 (5th Cir. 1974) (state department of pollution control; county planning board); Cheramie v. Tucker, 493 F.2d 586, 587-88 (5th Cir.) (highway department), *cert. denied*, 419 U.S. 868 (1974). *See also* Louisiana v. Ciolino, 393 F. Supp. 102, 107 (E.D. La. 1975) (state); Clifton v. Grisham, 381 F. Supp. 324, 326 (N.D. Miss. 1974) (state game and fish commission). The circuit position accords with the obvious import of the *Monroe-Kenosha* line.

> [I]t has even been suggested that the holding in *Monroe* should apply only to cities, counties, and parishes. However, this attempt to distinguish *Monroe* cannot be rationally supported within the framework of that case. The *Monroe* decision was based on the legislative history of the Civil Rights Act . . . and the reasoning of the Court would require the same result *no matter what type* of governmental entity was being sued.

Comment, *Suing Public Entities Under the Federal Civil Rights Act: Monroe v. Pape Reconsidered,* 43 U. Col. L. Rev. 105, 111 (1971) (emphasis added). *But see, e.g.*, Aurora Educ. Ass'n East v. Board of Educ., 490 F.2d 431, 435 (7th Cir.) (suggesting that a school board may be sued as an entity), *cert. denied*, 416 U.S. 985 (1974). The issue is currently before the Court. Monell v. Department of Social Servs., 532 F.2d 259, 262-64 (2d Cir. 1976) (school board is not a "person"), *cert. granted*, 97 S. Ct. 807 (1977).

[70] 528 F.2d 499 (5th Cir. 1976) (en banc), *petition for cert. filed*, 45 U.S.L.W. 3057 (U.S. July 27, 1976) (No. 75-1723), *noted in* 47 Miss. L.J. 799 (1976).

[71] 528 F.2d at 499-500. Also named as defendants were the individual members of the board of trustees. See note 81 and accompanying text *infra*.

> In cases involving entities lacking such powers and functions, the deciding factor is not the characteristics of the entity viewed in isolation but rather the purposes and status of the entity revealed by analysis [not controlled by state law] of its relationship to the larger governmental body with which it is connected. The inquiry in such a case becomes whether the public body is so connected—administratively, functionally, fiscally, and in other ways—to a state, city or county that it is not suable under § 1983, not because of its characteristics as an independent entity but because it is in effect an arm or agency of the state, city or county.[76]

Finding the required nexus,[77] the court held that the board, as admittedly the city,[78] was excludable from the "person" definition.[79] Constraints on the breadth of the holding, however, were not totally absent:

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[72] 520 F.2d 993, 998 (5th Cir. 1975), *rev'd en banc*, 528 F.2d 499 (5th Cir. 1976). The en banc majority adopted the analysis of Judge Godbold's dissent from the initial panel decision. 528 F.2d at 500.

[73] 520 F.2d at 997 (emphasis and citation omitted).

[74] 528 F.2d at 501.

[75]
> The rationale underlying the grant of immunity . . . has been held to extend to a wide variety of governmental entities. The Circuit Courts have indicated that the immunity extends to states, agencies and departments of the state, agencies of counties, agencies and departments of cities and various other governmental entities.

520 F.2d at 1004 (Godbold, J., dissenting) (footnotes omitted).

[76] *Id.* at 1005; *accord,* Warner v. Board of Trustees, 528 F.2d 505 (5th Cir.) (en banc) (per curiam), *cert. denied,* 429 U.S. 859 (1976).

The court ignored prior constructions of the state constitution by the Texas Supreme Court which defined functions of governmental subdivisions. In doing so, Judge Godbold concluded that "[f]ederal courts must make their own decisions, based upon federal law, of the status of a governmental agency as a 'person.'" 520 F.2d at 1006 (Godbold, J., dissenting). This conclusion conforms with the general philosophy of using federal standards to the exclusion of those of the states "when necessary to carry out the congressional objectives" of § 1983. Shaw v. Garrison, 545 F.2d 980, 984 (5th Cir. 1977). Furthermore, "adoption of [the] rule . . . is desirable because it fosters the uniform application of the civil rights laws." *Id.* at 985; *accord,* City of Safety Harbor v. Birchfield, 529 F.2d 1251, 1256 n.7 (5th Cir. 1976). *But cf.* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 97 S. Ct. 568, 572-73 (1977) (review of status under state law to determine availability of eleventh amendment defense in § 1983 suit); Ingram v. Steven Robert Corp., 547 F.2d 1260, 1263 (5th Cir. 1977) (utilization of state statute of limitations to toll § 1983 claim).

[77] Coupling extensive financial involvement by the city with a finding that the board was staffed by city officers and employees, 520 F.2d at 1005-06, Judge Godbold concluded that "[t]he extent of this administrative, functional and fiscal interrelation compels the

> This is not to say that every public entity performing some function that a larger and related governmental entity might perform enjoys . . . immunity. Necessarily a body of federal law must develop on a case-by-case basis.[80]

Muzquiz, however, has an additional and ultimately more critical impact. In addition to the board of trustees, its individual members were also joined in their official capacity as defendants. Concluding that the relief sought through these defendants "struck directly for the pocket" of an excludable entity,[81] the "nonperson" safe harbor was expanded to include the individual responsible officials.[82]

> In form, plaintiffs seek against the . . . members of the board a mandatory injunction ordering the individual[s] to refund *past* contributions to the fund. However, in substance, *this is nothing more than restitution against the fund itself.* If we allowed this action to proceed, then the bar which has been created by the judicial interpretations of § 1983 would be effectively eliminated, for any action which seeks restitution against a "nonperson" may be framed in terms of a mandatory injunction against the officials responsible for [the governmental entity] from which restitution is sought. The congressional intent which impels the "nonperson" limitation cannot be so lightly construed.[83]

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conclusion that the Board of Trustees of the Pension Fund is in essence an arm of the city." *Id.* at 1006.

[78] See note 69 *supra.*

[79] 528 F.2d at 501.

[80] 520 F.2d at 1006 (Godbold, J., dissenting).

[81] 528 F.2d at 500 (citations omitted).

[82] *Id.* at 500-01. See note 60 *supra*, detailing the general proposition that individual state officers are properly named as defendants in § 1983 suits.

[83] 528 F.2d at 501 (emphasis added). The holding seriously split the circuit. Judge Tuttle, writing for Judges Wisdom, Goldberg and Morgan, argued that the court was most concerned with an additional technique to curtail the case load and "seem[ed] to . . . have whittled down the clear statutory grant of civil rights litigation . . . to little more than an empty promise." *Id.* (Tuttle, J., dissenting). He concluded:

> The error which, respectfully, I think the court has made here is that it treats § 1983 as a statute granting or creating some sort of immunity to a municipal corporation. It does nothing of the sort. It merely does not *include* a municipal corporation within the word "person."

Id. at 502.

Judge Thornberry agreed:

> However certain the Court may be that an action is, "in reality", one directed at a governmental non-person, the fact is that the named defendants, and the ones against whom equitable relief would run, are persons. If Congress intended

Based on the *Muzquiz* rationale, naming the responsible individual members of a "nonperson" governmental entity in their official capacity[84] and seeking monetary relief in the form of past benefits from the "pocket" of the "nonperson," will not state an actionable claim in the circuit.[85]

> the statute to be construed other than in accordance with its natural and literal meaning, it could have given—or could now give—some objective basis for that conclusion. There is none.

Id. at 503 (Thornberry, J., dissenting in part and concurring in part).

Judge Godbold, the author of the initial dissent upon which the en banc majority relied, again dissented, stating that he now saw "the issue more clearly." *Id.* at 504 (Godbold, J., concurring in part and dissenting in part). Specifically, he noted that the expressed congressional intent was to protect city treasuries against damages and that the "dollar impact on the public treasury resulting from bona fide equitable relief . . . that requires public officers to make restitution out of the public treasury is another matter." *Id.* at 504.

Muzquiz has been construed by the Fifth Circuit to prohibit suits requesting back pay, a form of retroactive relief, Thurston v. Dekle, 531 F.2d 1264, 1269 (5th Cir. 1976), creating a clear conflict in circuits. *See* Thomas v. Ward, 529 F.2d 916, 919 (4th Cir. 1975) (awarding back pay in suit naming members of school board). Commenting on two Fourth Circuit decisions preceding *Ward* but in accord with its holding, one writer concludes that the cases indicate a continued manifestation of "the Fourth Circuit's . . . resistance to Supreme Court decisions narrowing the scope of remedies against public bodies in civil rights actions." 54 N.C.L. REV. 1062, 1063 (1976). The Court's inclination to adopt the Fourth Circuit approach, however, is demonstrated by Bishop v. Wood, 426 U.S. 341 (1976), a § 1983 suit brought by a police officer alleging due process violations in his discharge from the force and seeking reinstatement and back pay. *Id.* at 342-43 & n.1. Although the "person-nonperson" issue was briefed on the merits, Brief for Respondent at 3-6, Reply Brief for Petitioner at 2-6, the Court proceeded to the merits of the claim, noting that of the named defendants—the city manager, chief of police and city—only the city was not a "person" under *Monroe* and therefore not properly named. 426 U.S. at 343 n.1; *cf.* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 97 S. Ct. 568, 571-72 (1977) (assuming § 1331 jurisdiction in back pay suit against school board); Edelman v. Jordan, 415 U.S. 651, 666-67 (1974) (eleventh amendment prohibits grant of retroactive benefits from state treasury; no mention of issue that relief required would have come ultimately from a "nonperson"). Certiorari has been granted in a case that could settle the issue. Monell v. Department of Social Servs., 532 F.2d 259, 264-67 (2d Cir. 1976), *cert. granted*, 97 S. Ct. 807 (1977) (issue of back pay relief from presumed "nonpersons").

[84] State officers may, of course, be sued in their official capacity. *Ex parte* Young, 209 U.S. 123, 156-57 (1908); United Farmworkers v. City of Delray Beach, 493 F.2d 799, 802 (5th Cir. 1974); Sterzing v. Fort Bend Independent School Dist., 496 F.2d 92, 93 n.2 (5th Cir. 1974) (per curiam). Excepting cases seeking to impose personal, individual *damage* liability, a suit against the state officials in their official capacity is the correct procedure for initiating all § 1983 litigation. See section IV. *infra*.

[85] A recent opinion serves to highlight the uncertainties precipitated by *Muzquiz*. In Campbell v. Gadsden County Dist. School Bd., 534 F.2d 650 (5th Cir. 1976), suit was brought by an elementary school principal seeking, among other things, reinstatement and back pay. *Id.* at 652. In this context, Judge Ainsworth concluded:

> In *Muzquiz,* the suit was, in substance, an action against an impermissible party. The question whether a section 1983 action will lie . . . hinges . . . on whether or not the action is in substance an action against a "person" within the meaning of the statute.
>
> While section 1983 would thus suffice as a basis of jurisdiction if [the principal's] claim was merely *a request for equitable reinstatement in a principalship,* [forcing future payments by the "nonperson,"] *it is not adequate with regard to his claims for back pay and attorneys' fees.* Relief in the *form of restitution or damages* is not available against officers of an entity which is a "nonperson" under section 1983.

Id. at 655 n.10 (citations omitted) (emphasis added).

The circuit position is clear that injunctive relief resulting in future expenditures is not prohibited. McGill v. Parsons, 532 F.2d 484, 485 n.1 (5th Cir. 1976); *see* notes 162 through 172 and accompanying text *infra* (similar analysis employed for determining eleventh amendment immunity). *But cf.* Abbott v. Thetford, 534 F.2d 1101, 1103 (5th Cir. 1976) (en banc) (per curiam) (adopting dissent to panel opinion; reinstatement should not be ordered since confidential and cooperative relationship required), *cert. denied,* 97 S. Ct. 1598 (1977). The broad proposition enunciated in *Campbell* with respect to *Muzquiz*'s applicability to damage claims, *qua* damage claims, however, is misleading. In Davis v. Passman, 544 F.2d 865 (5th Cir.), *rehearing en banc granted,* 553 F.2d 506 (5th Cir. 1977), an ex-employee of Congressman Passman brought a § 1331 suit, see note 86 *infra,* alleging that she was discharged solely on the basis of her sex in violation of the fifth amendment. *Id.* at 867-68. Recognizing the *Muzquiz* parallel in the context of a sovereign immunity defense, *i.e.* the barring of relief that would retroactively draw funds from the federal treasury, Judge Goldberg refused to accept the defense, although the complaint "could conceivably [be construed] as limited to salary [back pay] from the government *rather than damages from Representative Passman individually.*" *Id.* at 877 (emphasis added). In distinguishing a claim for back pay from one for "damages" which includes back pay, the court implicitly recognized a type of claim not subject to the *Muzquiz* rationale, *i.e.* one based upon a standard rendering the defendant state officer *personally liable* as opposed to a judgment requiring the payment of a judgment by a protected entity. *Accord,* Muzquiz v. City of San Antonio, 528 F.2d 499, 500 n.5 (5th Cir. 1976) (en banc), *petition for cert. filed,* 45 U.S.L.W. 3057 (U.S. July 27, 1976) (No. 75-1723). See section IV. *infra.*

A final noteworthy aspect of *Campbell* involves the question of attorneys' fees. Although fees in the case were statutorily authorized, 20 U.S.C. § 1617 (1970), the court refused a grant based on § 1983 liability since the "final order" statutorily required as a prerequisite to an award could not be entered against a "nonperson." 534 F.2d at 655 n.10. This decision raises the possibility that local governmental entities, now protected only as a matter of statutory construction, will be treated with greater sensitivity than those heretofore enjoying eleventh amendment immunity. *Cf.* Gates v. Collier, 371 F. Supp. 1368, 1371-72 (N.D. Miss.) (attorneys' fees assessed against state), *aff'd,* 489 F.2d 298 (5th Cir. 1973), *vacated and remanded en banc,* 522 F.2d 81 (5th Cir. 1975) (per curiam) (for consideration in light of *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y* and *Edelman v. Jordan*), *on remand,* 70 F.R.D. 341 (N.D. Miss. 1976) ("[W]e are satisfied that attorneys' fees and cost awards, at least where allowable by *Alyeska,* partake more of the character of prospective relief sanctioned in *Edelman* than the retrospective money damage awards it proscribes."). See section II. *C. infra.* While the issue of eleventh amendment immunity and attorneys' fees in § 1983 cases is presumably now moot, *see* Stanton v. Bond, 528 F.2d 688 (7th Cir.), *vacated and remanded in light of* Pub. Law No. 94-559, 429 U.S. 973 (1976); note 5 *supra,* by not anticipating the *Muzquiz* approach, Congress' all-inclusive grant may already have an exception.

A distinct alternative to the *Muzquiz* labyrinth and the peculiarities of the "person-nonperson" dichotomy is available under 28 U.S.C. § 1331, the general federal question statute.[86] In *City of Kenosha v. Bruno*,[87] the owners of several retail liquor establishments brought an injunctive action alleging that the denial of their liquor license renewal applications violated due process.[88] Although the Supreme Court held that the "nonperson" city was not a proper defendant for purposes of section 1983, the availability of section 1331 jurisdiction was left open.[89] However, Justices Brennan and Marshall concurred, stating: "If appellees can prove their allegation that at least $10,000 is in controversy,[[90]] then § 1331 jurisdiction is available."[91] On the basis of this tentative precedent, the Fifth Circuit now permits section 1331 to be employed in lieu of section 1983.[92] In contrast to *Muzquiz*, if the nature of the entity sued does not rise to a stature forcing an eleventh amendment interlock,[93] retroactive relief, *i.e.* restitution, is available if the cause of action meets section 1331 criteria.[94]

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[86]
> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 . . . and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

28 U.S.C. § 1331(a) (1970), *as amended by* Pub. L. No. 94-574, § 2, 90 Stat. 2721 (1976). *See also* 42 U.S.C. §§ 1981, 1982 and 1985(3), to be discussed in Part II of this article.

[87] 412 U.S. 507 (1973).

[88] *Id.* at 508.

[89] *Id.* at 511.

[90] The leading case articulating standards governing satisfaction of the jurisdictional amount requirement is St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938). *See also* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 97 S. Ct. 568, 570-71 (1977).

[91] 412 U.S. at 516 (Brennan, J., concurring). In Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 97 S. Ct. 568 (1977), a § 1331 suit was brought against a school board alleging first amendment violations in the termination of a teacher's employment. *Id.* at 570. The district court concluded that jurisdiction was predicated upon § 1331 and the "person" limitation of § 1983 was inapplicable. *Id.* at 571-72. The school board argued that

> since Congress in § 1983 has expressly created a remedy relating to violations of constitutional rights under color of state law, one who seeks to recover for such violations is bound by the limitations contained in § 1983.

Id. at 571. Finding an arguably valid claim to jurisdiction, Mr. Justice Rehnquist noted the sensitivity of the issue and concluded that while the question would be left "for another day," he assumed that § 1331 jurisdiction was proper without regard to the limitations imposed by § 1983. *Id.* at 572.

[92] As stated in Wright v. Houston Independent School Dist., 393 F. Supp. 1149 (S.D. Tex. 1975), "there has never been a Fifth Circuit or Supreme Court case holding that a suit would not lie against a municipality . . . under 28 U.S.C. § 1331." *Id.* at 1152. *See* Reeves v. City of Jackson, 532 F.2d 491, 495 (5th Cir. 1976) (suit against city proper under § 1331); Hander v. San Jacinto Junior College, 522 F.2d 204, 205 (5th Cir. 1975) (per curiam), *quoting* Roane v. Callisburg Independent School Dist., 511 F.2d 633, 635 n.1 (5th Cir. 1975) ("[r]egardless of whether a school district is treated as a municipality or as a

B. Common Law Immunities

The Supreme Court has spoken of common law immunities as the antithesis of section 1983 in the sense that their invocation would "negate pro tanto the very remedy which it appears Congress sought to create."[95] In the same context, the Court has also expressed the conclusion that section 1983 "creates a species of tort liability that on its face admits of no immunities."[96] Despite these reservations, the concept has survived,[97] and specific categories of state officials are granted absolute immunity.[98] Accordingly, judicial recognition of the defense effectively

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'person' . . . the plaintiff . . . satisfied the jurisdictional requisites of § 1331"); United Farmworkers v. City of Delray Beach, 493 F.2d 799, 802 (5th Cir. 1974) (city may be amenable to suit as an entity under § 1331); Traylor v. City of Amarillo, 492 F.2d 1156, 1157 n.2 (5th Cir. 1974) (§ 1331 damage claim against city); Tucker v. Thompson, 421 F. Supp. 297, 300 (M.D. Ga. 1976) (suit for damages under § 1331 naming city found proper); Woodward v. Hereford Independent School Dist., 421 F. Supp. 93, 95 (N.D. Tex. 1976) (suit against school district for back pay proper under § 1331).

The Fifth Circuit also has accorded plaintiffs in the "nonperson" quagmire a great deal of sympathy, holding that a § 1331 claim may be recognized even though not pleaded in the complaint. *E.g.*, Hander v. San Jacinto Junior College, 522 F.2d 204, 205 (5th Cir. 1975) (per curiam); Kelly v. West Baton Rouge Parish School Bd., 517 F.2d 194, 197 (5th Cir. 1975).

[93] See section II. *C. infra* on the issue of eleventh amendment immunity.

[94] Stapp v. Avoyelles Parish School Bd., 545 F.2d 527, 531 n.7 (5th Cir. 1977); Hander v. San Jacinto Junior College, 522 F.2d 204, 205 (5th Cir. 1975) (per curiam); Woodward v. Hereford Independent School Dist., 421 F. Supp. 93, 95 (N.D. Tex. 1976). *But see* note 295 *infra* (discussion of the availability of a "damage" remedy, as contrasted with retroactive benefits, against a "nonperson" when § 1331 jurisdiction has been properly invoked). Attorneys' fees, however, are not available since § 1331 is outside the ambit of the new legislation. See note 2 *supra*.

[95] Imbler v. Pachtman, 424 U.S. 409, 434 (1976) (White, J., concurring).

[96] 424 U.S. at 417.

[97] Since the doctrine is inapplicable to suits in equity, see notes 104, 106 & 113 *infra*, this section is concerned only with the issue of immunity from damage actions.

[98] "Absolute immunity" must be distinguished from what is commonly termed "qualified immunity," which offers a defense dependent upon the circumstances and motivations for a particular action taken. See section IV. *infra*. The current bifurcated approach presents a much more satisfactory frame of reference than the more complicated "discretionary-nondiscretionary" dichotomy employed at common law. *See, e.g.*, Barr v. Matteo, 360 U.S. 564, 572-74 (1959) (detailing the distinction); Norton v. McShane, 332 F.2d 855, 859 (5th Cir. 1964) (explaining its application), *cert. denied*, 380 U.S. 981 (1965). For a discussion of the distinction's demise in § 1983 suits, see note 114 *infra*. With regard to the immunity doctrine as applied to federal officers, *compare* Barr v. Matteo, 360 U.S.

renders the defendant a protected "nonperson" for purposes of the statute.

The Court signaled the availability of the immunity defense in *Tenney v. Brandhove*,[99] a damage suit against members of a state legislative committee for alleged unconstitutional investigatory tactics employed by committee members.[100] Upholding the availability of the defense, it detailed the history of absolute immunity granted in England and in this country[101] to legislators engaged in activities where they "traditionally have power to act."[102] Believing its continuance essential to protect "[f]reedom of speech and action in the legislature" from the chilling effects of threatened lawsuits,[103] the Court concluded that the immunity was not abrogated "by covert inclusion in the general [person] language" of section 1983.[104]

564, 574-75 (1959) (immunity accorded high-ranking official) *with* Economou v. Department of Agriculture, 535 F.2d 688, 690-96 (2d Cir. 1976) (tracking the demise of immunity in § 1983 suits and granting only a qualified immunity to federal officials), *cert. granted sub nom.*, Butz v. Economou, 97 S. Ct. 1097 (1977). *See generally* K. DAVIS, ADMINISTRATIVE LAW §§ 26.01-.07 (1958); Comment, *Immunity of Public Officials From Liability Under the Civil Rights Act*, 18 ARK. L. REV. 81, 84-92 (1964); Note, *Official Immunity in Ohio: How to Sue the King's Men*, 43 CINN. L. REV. 557, 560 (1974).

[99] 341 U.S. 367 (1951).

[100] The plaintiff alleged that he was not called before the committee for a proper legislative purpose in that the committee members were attempting to intimidate him into silence and thereby deprive him of his first amendment rights. *Id.* at 371.

[101] The Court's review spanned the common law legislative immunity written into the "Speech or Debate Clause," as well as many state constitutions. *Id.* at 372-73.

[102] *Id.* at 379.

[103] *Id.* at 372.

[104] *Id.* at 376. The immunity established is fully explored in a series of cases arising under the speech or debate clause, now interpreted as granting an immunity identical to that established in *Tenney*. *E.g.*, Doe v. McMillan, 412 U.S. 306, 324 (1973). Under the clause, immunity is to be construed liberally to include "[c]ommittee reports, resolutions, and the act of voting . . . ; '[i]n short, . . . things generally done in a session of the House by one of its members in relation to the business before it.' " Gravel v. United States, 408 U.S. 606, 617-18 (1972) (citation omitted). Additionally, "[i]t is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." United States v. Brewster, 408 U.S. 501, 525 (1972).

Reaffirming *Tenney*, the Court in Eastland v. United Servicemen's Fund, 421 U.S. 491 (1975), concluded that "the power to investigate is inherent in the power to make laws." *Id.* at 504. Nevertheless, investigatory acts in preparation for hearings are not immune if they involve criminal behavior or are related to a third-party crime. Gravel v. United States, 408 U.S. 606, 628-29 (1972). Also, Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam), indicates that immunity will not protect a legislator from suit under the fourth amendment if he actively engages in an unlawful search and seizure to obtain information. *Id.* at 84-85. As with the charge of taking a bribe, a burglary, for example, can be "no part of the legislative process or function; it is not a legislative act." United States v. Brewster, 408 U.S. 501, 526 (1972); *cf.* McSurely v. McClellan, 553 F.2d 1277, 1287-88 (D.C. Cir. 1976) (en banc) (no immunity for committee investigator using materials procured in violation of fourth amendment), *petition for cert. filed*, 45 U.S.L.W. 3842 (U.S. June 28, 1977) (No. 76-1621).

Subsequently, in *Pierson v. Ray*,[105] absolute immunity from section 1983 damage liability[106] was granted to judges acting within the scope of their judicial authority.[107] Adhering to the *Tenney* analysis, the Court observed that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts

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Finally, it should be noted that the immunity doctrine is not applicable in suits against legislators seeking equitable relief. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 493 (1969) (five members of House named as defendants "individually and as representatives of a class of citizens who [were] serving . . . as Members of the House"). *But cf.* Eastland v. United Servicemen's Fund, 421 U.S. 491, 509 n.10 (1975) (speech or debate clause defense provides "absolute immunity" from judicial interference).

[105] 386 U.S. 547 (1967).

[106] The analysis of the case does not relate to suits in equity. As stated in United States v. McLeod, 385 F.2d 734 (5th Cir. 1967):

> In Pierson v. Ray, the Supreme Court held that judges are immune from liability for *damages* in suits under 42 U.S.C. § 1983. The case does not, of course, mean that they may not be enjoined from pursuing a course of unlawful conduct.

Id. at 738 n.3 (citation omitted). *But cf.* Cheramie v. Tucker, 493 F.2d 586, 588 (5th Cir.) (only "some authority recognizing a distinction between suits for damages and suits for purely equitable relief" against judges), *cert. denied*, 419 U.S. 868 (1974); Hill v. City of El Paso, 437 F.2d 352, 354 (5th Cir. 1971) (*Pierson* cited for the proposition that an injunctive suit against a state judge in his official capacity is prohibited). These latter decisions are aberrations at best. Indeed, the Supreme Court, *e.g.*, Juidice v. Vail, 97 S. Ct. 1211, 1214-15 (1977) (injunctive suit against state court judges); Kugler v. Helfant, 421 U.S. 117, 119 (1975) (state supreme court justices named as defendants); Sosna v. Iowa, 419 U.S. 393, 398 n.5 (1975) (state trial judge named defendant in suit for injunctive and declaratory relief), as well as the Fifth Circuit, *e.g.*, Williams v. Rubiera, 539 F.2d 470, 471 (5th Cir. 1976) (state trial court judges named defendants in suit seeking declaratory decree), and the district courts, *e.g.*, Bramlett v. Peterson, 307 F. Supp. 1311, 1321-22 (M.D. Fla. 1969); Phillips v. Cole, 298 F. Supp. 1049, 1051 (N.D. Miss. 1968); United States v. Clark, 249 F. Supp. 720, 727-28 (S.D. Ala. 1965), have routinely entertained cases requesting injunctive or declaratory relief against state court judges. This practice is in keeping with the fact that § 1983 is an exception to the anti-injunction statute, 28 U.S.C. § 2283 (1970). Mitchum v. Foster, 407 U.S. 225, 242-43 (1972).

[107] 386 U.S. at 554. If done within the described context, "immunity applies even when the judge is accused of acting maliciously and corruptly." *Id.* In extending this grant, the Court cited with approval the venerable case of Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872), where immunity was granted to a judge sued by a disbarred attorney. *Id.* at 356. Addressing the immunity question, the *Bradley* Court concluded that

> [a] distinction must be . . . observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.

Id. at 351-52. For example, if

> a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses . . . his commission would afford no protection to him in the exercise of the usurped authority.

Id. at 352.

committed within their judicial jurisdiction."[108] Moreover, in terms of the underlying policy considerations for its continuance, "[i]mposing . . . a burden on judges [of defending damage suits] would contribute not to principled and fearless decision-making but to intimidation."[109] In an analogous context, *Imbler v. Pachtman*[110] extended immunity to prosecutors performing acts "intimately associated with the judicial phase of the criminal process."[111] Utilizing reasoning identical to that employed in *Tenney* and *Pierson*, the Court found support for its conclusion both in traditional common law immunity[112] and in sound policy justifications mandating its continued recognition.[113] These decisions represent the only instances[114] in which the Court has excised certain

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[108] 386 U.S. at 553-54. This conclusion by the Court received mixed reviews. *Compare* Kates, *Immunity of State Judges Under The Federal Civil Rights Acts:* Pierson v. Ray *Reconsidered*, 65 Nw. U.L. REV. 615 (1970) *with* Comment, *supra* note 18, at 778.

[109] 386 U.S. at 553-54. The immunity

> "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."

Id. at 554 (citation omitted).

[110] 424 U.S. 409 (1976), *noted in* 47 MISS. L.J. 812 (1976).

[111] 424 U.S. at 430. *Imbler* arose from the petitioner's prior habeas release based on a "culpable use by the prosecution of misleading or false testimony" as well as the suppression of favorable testimony by a police fingerprint expert. *Id.* at 414-15. Following his release, the petitioner filed a § 1983 damage suit against the prosecutor. Against this background, the Court held that the two functions in issue, *i.e.* initiating a prosecution and conducting it in court, fell within the scope of the immunity granted. *Id.* at 431.

Paralleling this litigation was Hilliard v. Williams, 516 F.2d 1344 (6th Cir. 1975), *rev'd and remanded mem.*, 424 U.S. 961 (1976), where a woman was convicted of second-degree murder on circumstantial evidence which included a stained jacket she was wearing at the time of arrest. 516 F.2d at 1348. Although the prosecutor knew that the marks on the jacket were not human bloodstains, he did not bring this evidence to the jury's attention. Upon retrial based on the suppressed evidence, the defendant was acquitted. *Id.* Thereafter, she brought a § 1983 action against the prosecutor contending that he had violated her right to due process. *Id.* at 1345. Although in agreement with the basic proposition that immunity applied, the Sixth Circuit found liability since "[i]t is most emphatically not within the scope of a prosecuting attorney's duties to withhold exculpatory evidence and to direct witnesses to give misleading and deceptive testimony." *Id.* at 1350. The Supreme Court reversed and remanded in light of its decision in *Imbler* that immunity attaches to all acts "intimately" associated with the judicial process. 424 U.S. 961 (1976).

[112] 424 U.S. at 424.

[113]
> A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate.

Id. at 424-25.

As in the case of legislators and judges, see notes 104 and 106 *supra,* the immunity granted in damage suits is not available in equitable actions. *E.g.*, Mitchum v. Foster, 407 U.S. 225, 242-43 (1972) (injunctive relief against state prosecutions is proper to prevent "great, immediate, and irreparable loss of a person's constitutional rights"); Dombrowski v. Pfister, 380 U.S. 479, 483-86 (1965) (same). Indeed, the Seventh Circuit recently observed that

> [n]o case has been cited . . . nor has our own research revealed any [case] which holds that a state's prosecutor's immunities, *or any other* state official's immunity, to damage claims under the Civil Rights Act extends to injunctive remedies.

Boyd v. Adams, 513 F.2d 83, 86 (7th Cir. 1975) (emphasis added). Adhering to precedent and assuming that the criteria for an injunction have been satisfied, the Fifth Circuit has displayed no reticence in granting such relief against state prosecutors. *E.g.*, Shaw v. Garrison, 467 F.2d 113 (5th Cir.) (enjoining state perjury proceeding initiated in bad faith), *cert. denied,* 409 U.S. 1024 (1972).

[114] The stringency of the Court's position is reflected by Scheuer v. Rhodes, 416 U.S. 232 (1974), where a damage suit was brought against the Governor of Ohio and others as a result of the tragic events on the Kent State University campus. In reviewing the Sixth Circuit's acceptance of traditional common law principles as a grant of immunity to executive officials, Krause v. Rhodes, 471 F.2d 430, 434-38 (6th Cir. 1972), *rev'd sub nom.*, Scheuer v. Rhodes, 416 U.S. 232 (1974), the Court found that "[t]he immunity of the Crown has traditionally been of a more limited nature" than that afforded legislators, judges and prosecutors, 416 U.S. at 239-40 n.4, and concluded that "government officials, as a class, [cannot] be totally exempt, by virtue of some absolute immunity, from liability" under § 1983. *Id.* at 243; *accord,* Wood v. Strickland, 420 U.S. 308, 314-22 (1975) (rejecting absolute immunity argument proffered on behalf of school board members). *But see* Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 615-16 (1974) (leaving open the question of a chief executive's immunity in a suit contesting exercise of appointment power); Carter v. Jury Comm'n, 396 U.S. 320, 338 (1970) (same); James v. Wallace, 533 F.2d 963, 968 (5th Cir. 1976) (same).

As early as 1964, the Fifth Circuit expressed reservations concerning executive immunity in § 1983 suits. Norton v. McShane, 332 F.2d 855, 857-59 (5th Cir. 1964) (suggesting that executive immunity may be given a more limited scope under § 1983 than at common law), *cert. denied,* 380 U.S. 981 (1965). In keeping with Supreme Court precedent, the circuit has severely limited its availability in § 1983 litigation. Roberts v. Williams, 456 F.2d 819, 830-31 (5th Cir.) (state law immunities not available), *cert. denied,* 404 U.S. 866 (1971); Anderson v. Nosser, 438 F.2d 183, 201-02 (5th Cir. 1971) (same), *modified on rehearing en banc,* 456 F.2d 835 (5th Cir. 1972), *cert. denied,* 409 U.S. 848 (1973). While rendering one pre-*Scheuer* opinion holding a governor immune, Martone v. McKeithen, 413 F.2d 1373, 1375 (5th Cir. 1969) (per curiam), the circuit recently concluded without qualification that the "full range of officials [*sic*] immunity available at common law do not apply in actions brought under § 1983," Donaldson v. O'Connor, 493 F.2d 507, 530 (5th Cir. 1974), *vacated and remanded on other grounds,* 422 U.S. 563 (1975).

> [Appellee's] argument is essentially that [as a state hospital administrator] he is entitled to the defense, available to state officials in most common law jurisdictions, of absolute immunity for acts done in the performance of a "discretionary"—as opposed to a "ministerial"—function. We must reject [the argument].

493 F.2d at 530 (citations omitted).

classes of state officials from the "every person" definition.[115]

Fifth Circuit precedent with respect to the scope of legislative[116] and judicial[117] immunity recognized by the Supreme Court fits comfortably

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[115] Although only the faintest dictum exists for further expansion, *see* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872) (unexplained reference to immunity for "judicial officers"), the Court has given every indication that jurors remain absolutely immune from suit. *See* Imbler v. Pachtman, 424 U.S. 409, 423 (1976) (stressing the proposition's strength in the common law). In the same context, the Fifth Circuit has unequivocally extended immunity to members of a grand jury. Martone v. McKeithen, 413 F.2d 1373, 1376 (5th Cir. 1969) (per curiam).

[116] In City of Safety Harbor v. Birchfield, 529 F.2d 1251 (5th Cir. 1976), the court held that with respect to any conduct within the "sphere of legislative authority" and regardless of the type or quality of motivation alleged, legislators enjoy absolute, unqualified immunity. *Id.* at 1256-57. More recently, however, in Davis v. Passman, 544 F.2d 865 (5th Cir.), *rehearing en banc granted*, 553 F.2d 506 (5th Cir. 1977), Judge Goldberg brushed aside claims of immunity for a congressman sued by a former aide with something less than a straightforward, evenhanded approach:

> Peripheral or tangential activities of a representative must not be confused with the legislative core. A representative's transgressions are not given absolute absolution. The Constitution establishes an immunity for aberrations in a representative's legislative activities, but members of Congress become mere mortals when they operate in more mundane fields. When members of Congress dismiss employees they are neither legislating nor formulating legislation.

Id. at 880.

[117] The Supreme Court's decision in *Pierson* reinforced the circuit's longstanding adherence to the concept of judicial immunity, *e.g.*, Beard v. Stephens, 372 F.2d 685, 690 (5th Cir. 1967); Carmack v. Gibson, 363 F.2d 862, 864 (5th Cir. 1966); Gay v. Heller, 252 F.2d 313, 315 (5th Cir. 1958), and recent cases reflect an identical posture. *E.g.*, Conner v. Pickett, 552 F.2d 585, 586 (5th Cir. 1977) (per curiam) (within the scope of his authority, judge is immune); Hill v. McClellan, 490 F.2d 859, 860 (5th Cir. 1974) (per curiam) (same); Carter v. Duggan, 455 F.2d 1156, 1158 (5th Cir. 1972) ("state judges . . . may not be [held liable] for damages for judicial action or inaction . . . under . . . Section 1983 or any other theory of liability"). Moreover, the immunity is available to the lowest echelon of the judicial system, *e.g.*, Grundstrom v. Darnell, 531 F.2d 272, 273 (5th Cir. 1976) (per curiam) (justice of the peace), and incorporates *Bradley* criteria, see note 107 *supra*, to protect all judicial acts save those exercised with a "clear absence of all jurisdiction over the subject matter." Williams v. Sepe, 487 F.2d 913, 914 (5th Cir. 1973) (per curiam). By definition, such protection encompasses cases which merely raise "nice questions of jurisdiction." *Id.* Examples of such "nice questions" include: (1) a default judgment when the return date on the summons is in error, Mississippi *ex rel.* Giles v. Thomas, 464 F.2d 156, 158-59 (5th Cir. 1972) (per curiam); (2) failure to follow correct procedure for indirect contempt of court, Williams v. Sepe, 487 F.2d 913, 913-14 (5th Cir. 1973) (per curiam); and (3) issuance of an arrest warrant with "doubts" as to jurisdiction, Keeton v. Guedry, 544 F.2d 199, 200 (5th Cir. 1976) (per curiam).

While cases in other circuits present examples involving clear absence of jurisdiction, *e.g.*, Spires v. Bottorff, 317 F.2d 273, 274 (7th Cir. 1963) (interference with proceeding after with the latter's analysis. However, prosecutorial immunity decisions prior to *Imbler* do not rest on an identical foundation and are a source of concern if viewed as legitimate precedent.

1. The Grant of Immunity

Imbler clearly establishes that no nexus exists between common law prosecutorial immunity and the separate but parallel immunity granted members of the judiciary. In arriving at this conclusion, the Court explicitly rejected lower court holdings that immunity, rather than being independent, was "quasi-judicial"[118] or, in other words, derivative of the judicial grant. In doing so, it characterized such an approach as "overly simplistic"[119] and reaffirmed the test to be used in *all* instances to determine the propriety of granting immunity to a class of state officials:

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judge disqualified himself), *cert. denied,* 379 U.S. 938 (1964); Wade v. Bethesda Hosp., 337 F. Supp. 671, 673 (S.D. Ohio 1971) (sterilization ordered without statutory authority), the somewhat hazy line between "nice questions" and "clear absence" is best demonstrated by a comparison of Fifth and Ninth Circuit decisions rendered in analogous factual settings.

In McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972), an elderly couple approached a Texas judge in chambers to discuss an upcoming trial involving their son. For no apparent reason, the judge ordered their arrest by the sheriff. The judge's act was found to be in his "judicial jurisdiction," *id.* at 1282, for four reasons: (1) it involved utilization of the contempt power, a normal judicial function; (2) the act occurred in the judge's chambers; (3) the controversy concerned a pending case; and (4) the visit was made to the judge in his official capacity. *Id.* Relying in part on *McAlester,* the Ninth Circuit in Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974), held that a justice of the peace shed his immunity when he left the bench and assaulted a defendant. Although the latter three factors of the *McAlester* analysis were found to be present, assault and battery was held not to be a "normal" judicial function. *Id.* at 64; *cf.* McGlasker v. Calton, 397 F. Supp. 525, 531 (M.D. Ala.), *aff'd without opinion,* 524 F.2d 1230 (5th Cir. 1975) (judge's coercion of plaintiff held in "excess of" rather than "without" jurisdiction).

[118] Imbler v. Pachtman, 424 U.S. 409, 420 (1976).

[119] *Id.* at 421. Before the Court, the petitioner attacked the concept of "quasi-judicial" immunity from the standpoint of Scheuer v. Rhodes, 416 U.S. 232 (1974), arguing that as a member of the executive branch, the prosecutor could not claim immunity reserved for the judiciary. 424 U.S. at 420. *See* Brief for Petitioner at 53-61, Scheuer v. Rhodes, 416 U.S. 232 (1974), which stated:

> We suggest that this Court must come to grips with the fundamental issue of whether a prosecutor, a member of the executive branch, should derive any pseudo-immunity stemming from the immunity accorded the judiciary . . . . ["Quasi-judicial"] immunity . . . is an intellectual non-sequitur.

Id. at 61. For a detailed analysis of this concept, see Note, *Quasi-Judicial Immunity: Its Scope & Limitations in Section 1983 Actions,* 1976 DUKE L.J. 95.

> [O]ur earlier decisions on § 1983 immunities [*Tenney* and *Pierson*] were not products of judicial fiat that officials in different branches of government are differently amenable to suit under § 1983. Rather, each was predicated upon a considered inquiry into [1] the immunity historically accorded the relevant official at common law and [2] the interests behind it.[120]

This rejection strikes at the heart of pre-*Imbler* cases in the Fifth Circuit granting immunity to prosecutors on the theory that they serve as "quasi-judicial" officers.[121] If the matter were limited solely to a differing approach to reach the same result, a simple citation to *Imbler* in a future case would suffice. The phrase, however, is generic and has taken on two distinct meanings, neither of which bears any relation to prosecutors *qua* prosecutors. First, by its very language, it serves as a potential vehicle for granting immunity to anyone performing under judicial supervision or direction. Second, it provides a means for extending immunity to members of the executive branch exercising powers in a "quasi-judicial" capacity, *i.e.* rendering decisions or exercising the same sort of adjudicatory, discretionary powers as a court.

The latter approach[122] is exemplified by the circuit's summary affirmance in *Pate v. Alabama Board of Pardons & Paroles*,[123] a case involving allegations that inadequate and negligent supervision of a parolee resulted in the rape and murder of the plaintiff's daughter.[124] Dismissing the claim against the individual members of the parole board, Judge Varner of the Middle District of Alabama concluded:

> There has been a strong tendency in the courts to grant to parole and probation officials an immunity from suit under . . . § 1983 similar to that granted to judges on the ground that such officials, when performing their official duties, are engaged in "quasi-judicial" activities.[125]

Furthermore, relying on precedent from the Ninth Circuit[126] and citing

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[120] 424 U.S. at 421.

[121] *E.g.*, Madison v. Gerstein, 440 F.2d 338, 341 (5th Cir. 1971); Carmack v. Gibson, 363 F.2d 862, 864 (5th Cir. 1966).

[122] Purposely omitted as illustrations are previous circuit statements on the subject which do no more than leave the issue in limbo. *Compare* Cruz v. Skelton, 502 F.2d 1101, 1101 (5th Cir. 1974) (per curiam) (members of Texas Board of Pardons and Paroles entitled to immunity "just as . . . other public employees engaged in the performance of quasi-judicial duties") *with* Williams v. McCall, 531 F.2d 1247, 1248 (5th Cir. 1976) (per curiam) (§ 1983 suit proper to test "quasi-judicial" function relating to parole procedures).

[123] 409 F. Supp. 478 (M.D. Ala. 1976), *aff'd without opinion*, 548 F.2d 354 (5th Cir. 1977).

[124] *Id.* at 478-79.

[125] *Id.* at 479.

[126] Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970), *cert. denied*, 403 U.S. 908 (1971); Silver v. Dickson, 403 F.2d 642 (9th Cir. 1968), *cert. denied*, 394 U.S. 990 (1969).

Imbler without consideration of the mandated common law justifications, the court concluded "that parole officials should be protected by the same absolute immunity afforded judges for acts resulting from the performance of their official duties."[127]

Significantly, this expansive approach to immunity had earlier been expressly rejected by the Fifth Circuit in a decision overruled by the Supreme Court on other grounds. In *Donaldson v. O'Connor*,[128] a former mental patient brought a section 1983 suit against mental health officials alleging continued and unlawful detention.[129] At trial, the defendants were refused the following jury instruction:

> "If you find that the defendants were operating in a quasi-judicial function, in that they, under state law, were making a judgment as to whether or not plaintiff should be released, defendants are immune from liability under the Civil Rights Act."[130]

Reasoning that the concept of absolute immunity has no place in suits against officials of the executive branch, the court rejected the very Ninth Circuit precedent relied on in *Pate*[131] and approved the trial judge's refusal to tender the instruction.[132] Although the *Donaldson* ruling is now isolated from the mainstream of circuit precedent, it obviously accords with the mandates of *Imbler*.[133]

As indicated previously, further evidence of the circuit's expansion of the immunity concept arises in the context of individuals performing under judicial supervision or direction. In *Mississippi ex rel. Giles v.*

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[127] 409 F. Supp. at 479. In Delatte v. Genovese, 273 F. Supp. 654 (E.D. La. 1967), Judge Rubin, in rejecting a claim that a coroner "shares the shelter of the judge's gown," *id.* at 657, chose not to deal with the "quasi-judicial" issue. Rather, he likened the coroner's allegedly fraudulent signing of a commitment certificate to a ministerial function and held that a § 1983 suit would lie. *Id.* at 658. See note 114 *supra* for a discussion of the presumed demise of the "discretionary-ministerial" dichotomy for purposes of § 1983 litigation.

[128] 493 F.2d 507 (5th Cir. 1974), *vacated and remanded on other grounds,* 422 U.S. 563 (1975). In light of such plenary review by the Supreme Court, *Donaldson* is an unlikely candidate to be read in search of viable precedent.

[129] 493 F.2d at 509-13.

[130] *Id.* at 529.

[131] See note 126 *supra.*

[132] 493 F.2d at 530-31 & n.58. The portion of the opinion directed to this issue clearly rejects a grant of absolute immunity to state officials performing "discretionary acts" regardless of whether such acts are "quasi-judicial" in nature. 493 F.2d at 530. The correctness of the conclusion is reflected by the fact that the immunity argument was neither presented to the Supreme Court on review nor noted in the Court's opinion.

[133] *See also* Wood v. Strickland, 420 U.S. 308, 319 (1975) (absolute immunity rejected for school board members acting as "adjudicators" in school disciplinary process).

Thomas,[134] the plaintiff named, among several defendants, the deputy sheriffs who had served her with an erroneous summons.[135] In a per curiam opinion, the court granted *absolute* immunity on the basis that the officers "were immune from suit as judicial officers."[136] Following this approach, performance of the ministerial function[137] of service of process transforms the same persons from "police officers" to "judicial officers" for purposes of a section 1983 damage claim. Drawing upon the *Thomas* decision as well as those extending immunity to prosecutors as "quasi-judicial" officers, Judge Smith of the Northern District of Mississippi has explained that

> [t]he immunity of judges for acts committed within their judicial jurisdiction . . . spreads outward from the center and may also shield related public servants. . . . [W]here law enforcement officers are lawfully acting as officers of the court, they share the immunity afforded judges and the entire judicial process.[138]

Again, the position taken in *Donaldson* rejects an extension of immunity through this aspect of the "quasi-judicial" concept. Reaffirming the fact that recognition of such "broad judicial immunities 'would practically constitute a judicial repeal' of section 1983,"[139] the *Donaldson* panel also rejected Ninth Circuit precedent[140] that officers of the executive branch acting pursuant to judicial direction are immune from liability.[141] In keeping with the basic tenets of *Donaldson*, recent circuit cases, while not overruling previous precedent, indicate that state officials normally guaranteed only a qualified immunity will not receive a "stepped-up" defense merely because their actions emanate from the judicial system.[142]

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[134] 464 F.2d 156 (5th Cir. 1972) (per curiam). *See also* United States *ex rel.* Bailey v. Askew, 486 F.2d 134, 135 (5th Cir. 1973) (per curiam) (judicial immunity accorded jailer detaining prisoner pursuant to valid commitment order).

[135] 464 F.2d at 157. As a result of the proceedings, the plaintiff was temporarily evicted from her apartment. *Id.*

[136] *Id.* at 159-60, *citing* Pierson v. Ray, 386 U.S. 547 (1967). Also cited in support of this proposition were a number of cases from other circuits extending "quasi-judicial" immunity to various court-related officials. Davis v. McAteer, 431 F.2d 81, 82 (8th Cir. 1970) (court clerk); Gillibeau v. City of Richmond, 417 F.2d 426, 430 (9th Cir. 1969) (municipal court officers acting at direction of judge); Lockhart v. Hoenstine, 411 F.2d 455, 460 (3d Cir.) (prothonotary acting pursuant to court order), *cert. denied*, 396 U.S. 941 (1969); Sullivan v. Kelleher, 405 F.2d 486, 487 (1st Cir. 1968) (per curiam) (court clerk). While the circuit has implicitly rejected this line of cases by concluding, without analysis, that § 1983 damage suits against court clerks may state a cause of action, Qualls v. Shaw, 535 F.2d 318, 319 (5th Cir. 1976) (per curiam), Judge Wood recently concluded that "clerks of court are . . . entitled to immunity the same as judges when performing their duties." Zimmerman v. Spears, 428 F. Supp. 759, 762 (W.D. Tex. 1977) (citation omitted).

[137] For a discussion of the general demise of the common law ministerial-discretionary dichotomy, see note 114 *supra*.

[138] Boydstun v. Perry, 359 F. Supp. 48, 50 (N.D. Miss. 1973).

[139] Donaldson v. O'Connor, 493 F.2d 507, 530 (5th Cir. 1974), *vacated and remanded on other grounds*, 422 U.S. 563 (1975) (citation omitted).

[140] *E.g.*, Hoffman v. Halden, 268 F.2d 280, 300 (9th Cir. 1959). *See also* Bricker v. Michigan Parole Bd., 405 F. Supp. 1340, 1345 (E.D. Mich. 1975) (parole board members immune since they act "as an arm of the sentencing judge just as prosecuting attorneys act in a quasi-judicial capacity in bringing criminal actions").

2. The Scope of Prosecutorial Immunity

Under *Imbler*, absolute immunity is to be granted prosecutors performing functions "intimately associated with the judicial phase of the criminal process."[143] Specifically, two facets of prosecutorial activity now fall within the protected area: "[1] deciding which suits to bring and [2] conducting [such suits] in court."[144] As to functions[145] disassociated from the factual context[146] in which the grant of immunity was announced, however, the Court emphasized that

> [w]e have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility

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[141] 493 F.2d at 529-30.

[142] Rather than being protected by a grant of absolute immunity, activity engaged in pursuant to judicial direction is subject to the "good faith-knew or reasonably should have known" defense. See section IV. *infra*. In Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976) (en banc), *cert. denied*, 429 U.S. 865 (1976), the court reviewed several false imprisonment cases, including those brought when detention was pursuant to a valid commitment order, and concluded:

> [S]ince the judiciary [is] immune, it follows that persons who are obliged to carry out judicial orders . . . are also immune. . . .
>
> The rule of law to which these cases point [is] that a defense of official immunity is available to [a state officer] *who has acted in reasonable good faith*.

Id. at 1214 (emphasis added); *accord*, Rheuark v. Shaw, 547 F.2d 1257, 1259 (5th Cir. 1977) (cause of action stated against court clerk); Qualls v. Shaw, 535 F.2d 318, 319 (5th Cir. 1976) (per curiam) (same); Miller v. Jones, 534 F.2d 1178, 1179 (5th Cir. 1976) (reliance upon facially valid arrest warrant a matter of "good faith" defense); Stephenson v. Gaskins, 539 F.2d 1066, 1067-68 (5th Cir. 1976) (per curiam) (sheriff's immunity from false imprisonment suit not absolute). *See also* Smith v. Martin, 542 F.2d 688, 690 (6th Cir. 1976) (per curiam) (no personal liability for carrying out official orders "without malice or corrupt motive"); McLallen v. Henderson, 492 F.2d 1298, 1300 (8th Cir. 1974) ("where the clerk, or reporter can show that he was acting . . . in good faith" qualified immunity exists).

One need only consider the scenario of a policeman about his own private, nefarious business procuring a search warrant predicated upon a perjured affidavit and subsequently claiming absolute immunity on the basis of "quasi-judicial" activity to conclude that, as a practical matter, the concept should play no role in § 1983 litigation. *Cf.* Hicks v. Miranda, 422 U.S. 332, 351 (1975) (state judicial authorization for seizures may be impeached for purposes of developing record sufficient to generate federal injunctive relief against pending criminal proceedings).

[143] Imbler v. Pachtman, 424 U.S. 409, 430 (1976).

[144] *Id.* at 424.

[145] *Id.* at 431 n.33 (detailing non-judicially oriented activities).

[146] See note 111 *supra*.

> that cast him in the role of an administrator or investigative officer rather than that of advocate.[147]

Prior to *Imbler*, the circuit employed a bifurcated approach in determining the grant of absolute immunity vis-à-vis the type and quality of prosecutorial activity. First, prosecutors engaged in "quasi-judicial" functions were granted absolute immunity.[148] Second, imposition of liability was possible if the prosecutor engaged in acts "outside the scope of his jurisdiction and without authorization of law."[149] While the latter test was applied only in suits alleging unconstitutional conduct in the course of investigatory, as contrasted with "quasi-judicial," activities,[150] future applications of the *Imbler* test will be required to determine the precise point where the grant of absolute immunity is shed.[151]

C. *The Eleventh Amendment*

A third source of exclusion from section 1983 liability is found in the eleventh amendment:

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[147] 424 U.S. at 430-31.

[148] Circuit cases employing this approach fall within the scope of the *Imbler* grant of immunity. *See, e.g.,* Guerrero v. Barlow, 494 F.2d 1190, 1191 (5th Cir. 1974) (per curiam) (defendant refused access to supplementary police reports), *cert. denied,* 424 U.S. 975 (1976); Madison v. Gerstein, 440 F.2d 338, 339 (5th Cir. 1971) (prosecution for child abuse); Madison v. Purdy, 410 F.2d 99, 102 (5th Cir. 1969) (malicious prosecution); Carmack v. Gibson, 363 F.2d 862, 864 (5th Cir. 1966) (attacking method of juror selection).

[149] Lewis v. Brautigam, 227 F.2d 124, 129 (5th Cir. 1955). In contrast to the "quasi-judicial" approach to immunity, this test found viability in the context of prosecutors engaged in conduct preliminary or subsequent to clear engagement of the judicial system in a criminal prosecution. *See* Bryan v. Jones, 519 F.2d 44, 45 n.1 (5th Cir. 1975) (issue of immunity in suit brought by inmate alleging false imprisonment), *rev'd en banc on other grounds*, 530 F.2d 1210 (5th Cir.), *cert. denied*, 429 U.S. 865 (1976); Madison v. Purdy, 410 F.2d 99, 101-02 (5th Cir. 1969) (participation in allegedly false arrest); Lewis v. Brautigam, 227 F.2d 124, 126-29 (5th Cir. 1955) (procuring allegedly coerced confession). In applying the test to extra-judicial activities, the circuit apparently incorporated a subjective "shock the conscience" test. Rochin v. California, 342 U.S. 165, 170-71 (1952); *see* Brazzell v. Adams, 493 F.2d 489, 490 (5th Cir. 1974) (entrapment allegations insufficient to pierce immunity). If one adopts the police model, *i.e.* no absolute immunity for this category of state officials, the circuit's refusal to extend the grant to prosecutors engaged in investigative functions appears inherently correct. *See* Hampton v. City of Chicago, 484 F.2d 602, 608 (7th Cir. 1973) (Stephens, J., holding no immunity for state's attorney who planned raid accomplished through deadly force), *cert. denied*, 415 U.S. 917 (1974).

[150] See note 149 *supra*.

[151] For a detailed analysis of the full scope of prosecutorial activities, see Imbler v. Pachtman, 424 U.S. 409, 420-29 (1976). In Bruce v. Wade, 537 F.2d 850 (5th Cir. 1976), the court found the claimed immunity for seeking an indictment and presenting evidence at trial to be well within the grant. *Id.* at 852; *see* Fulford v. Klein, 550 F.2d 342, 342 (5th Cir. 1977) (en banc) (per curiam) (Ainsworth, J., dissenting) (noting propriety of dismissing damage suit against prosecutor alleging failure to divulge exculpatory evidence).

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State,[[152]] or by Citizens or Subjects of any Foreign State.[153]

In determining whether an eleventh amendment defense is properly invoked,[154] the issue is not to be determined "by the mere names of

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[152] This portion of the amendment also prohibits federal suits against nonconsenting states by their own citizens. *See, e.g.,* Edelman v. Jordan, 415 U.S. 651, 662-63 (1974) (relief denied to Illinois citizens seeking retroactive payment of benefits from state public aid director); Hans v. Louisiana, 134 U.S. 1, 15 (1890) (suit by Louisiana citizen to recover interest on state bonds dismissed for lack of state's consent to be sued). It does not, however, bar such suits by the United States. United States v. Mississippi, 380 U.S. 128, 140-41 (1965).

[153] U.S. CONST. amend. XI. The amendment was passed in response to Chisholm v. Georgia, 2 Dall. 419 (1793) (state liable to suit by citizen of another state).

> "When Chisholm dared to sue the 'sovereign state' of Georgia, all the states were so indignant that Congress moved with vehement speed to prevent subsequent affronts to the dignity of states. More than the dignity of a sovereign state was probably at issue, however. When the Eleventh Amendment was proposed many states were in financial difficulties and had defaulted on their debts. The states could therefore use the new amendment not only in defense of theoretical sovereignty but also in a more practical way to forestall suits by individual creditors!"

Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276 n.1 (1959), *quoting* M. IRISH & V. PROTHRO, THE POLITICS OF AMERICAN DEMOCRACY 123 (1959).

[154] The amendment is jurisdictional and failure to raise it as a defense at trial or on appeal does not constitute a waiver. Edelman v. Jordan, 415 U.S. 651, 677-78 (1974); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 466-67 (1945). Moreover, the existence of immunity is a matter of federal law and is clearly distinguishable from any grant or waiver of immunity under state law.

> Whether [the state] permits such a suit to be brought . . . in its own courts is not determinative of whether [the state] has relinquished its Eleventh Amendment immunity from suit in the federal courts.

Edelman v. Jordan, 415 U.S. 651, 677 n.19 (1974); *accord,* Jagnandan v. Giles, 538 F.2d 1166, 1177 (5th Cir. 1976) (statutory provision that state board of trustees could "sue or be sued" not a waiver for eleventh amendment purposes), *cert. denied,* 97 S. Ct. 2959 (1977). *See also* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276 (1959); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 465 (1945). Although "a waiver [of eleventh amendment immunity] is not lightly inferred," Scott v. Board of Supervisors, 336 F.2d 557, 558 (5th Cir. 1964), waivers can take various forms. In Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959), the Court found waiver where a state participated in an interstate compact approved by Congress which provided that each compacting state would have the power "to contract, to sue, and be sued in its own name." *Id.* at 277. In Parden v. Terminal Ry., 377 U.S. 184 (1964), a general section of the Federal Employers Liability Act providing for damage suits in federal court was held sufficient to justify suit against a state owning a railroad acquired after passage of the act. The Court based its conclusion on its finding of congressional "intent" that the act should apply to all railroads, "whether they [were] state owned or privately owned." *Id.* at 188.

This seemingly broad approach of finding effective waiver by participation in congrestitular parties, but by the essential nature and effect of the proceeding."[155] More precisely,

> when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.[156]

Thus, although state officials are within the framework of the "person" language,[157] if the entity which they represent may lay claim to the eleventh amendment defense, then individual defendants named in their official capacity are entitled to assert the defense on behalf of the state.[158]

As a matter of substantive law, the eleventh amendment protects only a state and not its political subdivisions.[159] In one limited situation,

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sionally sanctioned programs was narrowed in Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973), a suit by state hospital employees against the state for overtime compensation allegedly due under the Fair Labor Standards Act. The relevant section provided that "*any* employer who violates the provisions of . . . this Act shall be liable to the employee or employees affected." *Id.* at 283 (emphasis added). Distinguishing entrance into a federally regulated field after enactment of a general statute authorizing suit (as in *Parden*) and statutes regulating a preexisting area of state activity, the Court held in favor of immunity and concluded:

> It is not easy to infer that Congress in legislating pursuant to the Commerce Clause . . . desired silently to deprive the States of an immunity they have long enjoyed . . . . Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum.

Id. at 285. In Edelman v. Jordan, 415 U.S. 651 (1974), a state's participation in the Social Security program was held insufficient to constitute a waiver. The opinion incorporated what the Court considered to be two basic principles. First, mere state participation in a program through which the federal government provides assistance is insufficient to establish consent to be sued. Second, a waiver of immunity can be implied only "by the most express language or by . . . overwhelming implication from the text" of a federal act. *Id.* at 673. Finally, in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court faced the issue of whether Congress, under § 5 of the fourteenth amendment, could legislatively override the immunity granted by the eleventh amendment. The Court held that the enforcement provisions of § 5, see note 19 *supra*, were designed to place "significant limitations" on the states. *Id.* at 456. Accordingly, § 5 permits Congress to enact legislation authorizing "private suits against the states which are unconstitutionally impermissible in other contexts." *Id.* at 456 (citation omitted). *See also* Mauclet v. Nyquist, 406 F. Supp. 1233 (W.D.N.Y.), *appeal dismissed*, 97 S. Ct. 2962 (1977) (issue of whether the fourteenth amendment automatically overrides the eleventh amendment).

[155] *Ex parte* New York, 256 U.S. 490, 500 (1921).

[156] Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945).

[157] See note 60 *supra*.

[158] "The bar of the Eleventh Amendment . . . extends to states and state officials." Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 97 S. Ct. 568, 572 (1977).

[159] Lincoln County v. Luning, 133 U.S. 529, 530 (1890); *accord*, Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974) (for purposes of eleventh amendment immunity, a county

however, even if the state is the "real party" defendant, eleventh amendment strictures may be avoided. In *Ex parte Young*,[160] railroad stockholders brought suit naming the attorney general of Minnesota as a defendant seeking to restrain him from enforcing a state statute which allegedly violated the constitutional rights of railroad corporations.[161] Although as a practical matter the suit was against the state, the Court obviated the immunity issue by creating the classic legal fiction:

> The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the state in its Sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct.[162]

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does not occupy the same position as a state); Moor v. County of Alameda, 411 U.S. 693, 712-21 (1973) (diversity suit maintainable against county). *See also* Hopkins v. Clemson Agricultural College, 221 U.S. 636, 646 (1911) ("neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the state alone").

[160] 209 U.S. 123 (1908).

[161] *Id.* at 129.

[162] *Id.* at 159-60 (emphasis added), *quoted with approval in* Scheuer v. Rhodes, 416 U.S. 232, 237 (1974) (holding that state officials may be held personally liable in § 1983 suits for damages). See section IV. *infra.* Professor Davis analyzes *Ex parte Young* and its effect as follows:

> Of course, the Court well knew that the attorney general was still attorney general while he was enforcing the statute, and the Court well knew that the effect of enjoining the attorney general was to enjoin the state from carrying out the unconstitutional statute. From that day to this the false pretense made by the Court in *Ex parte Young* has been the mainstay in challenging governmental action through suits for injunctions and declaratory judgments.

Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. Chi. L. Rev. 435, 437 (1962). On this same point, the Fifth Circuit has stated:

> It is now rubric that state officials may be sued in federal court on the basis that the state statutes under which they are acting are unconstitutional. By like reasoning the state's immunity has been held not to shelter state officials from suit when it is claimed that their acts go beyond federal constitutional bounds, whether or not the constitutionality of the state statute is involved.

Mobil Oil Corp. v. Kelley, 493 F.2d 784, 786-87 (5th Cir.) (citations omitted), *cert. denied,* 419 U.S. 1022 (1974).

Implicit in the *Ex parte Young* approach is a recognition that although compliance with prospective injunctions may have a substantial effect on a state treasury, "[s]uch

Prospective injunctive relief exemplified by the *Ex parte Young* situation, however, is distinguishable from "equitable restitution" seeking the payment of state funds as reparation for benefits retained by the state which, but for a constitutional violation, would have been due those bringing the suit.[163] In *Edelman v. Jordan*,[164] a section 1983 suit charged that administration of the state welfare program violated federal statutory and constitutional rights of welfare recipients and named as defendants two former directors of the Illinois Department of Public Aid.[165] The plaintiff's prayer for relief included a request for " 'a permanent injunction enjoining the defendants to award . . . plaintiffs all . . . benefits wrongfully withheld.' "[166] Noting that the request stood "on quite a different footing"[167] from that involved in *Ex parte Young*, the Court distinguished the fiscal consequences attendant to future compliance with constitutional standards from retroactive relief which must "inevitably come" from a state's treasury.[168] Thus, although the former was not "totally without effect on the State's revenues,"[169] the

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an ancillary effect . . . is a permissible and often an inevitable consequence of the principle announced." Edelman v. Jordan, 415 U.S. 651, 668 (1974). *See, e.g.*, Griffin v. County School Bd., 377 U.S. 218, 233 (1964) (injunction requiring public schools to reopen and ordering supervisors to exercise their power to levy taxes); Gates v. Collier, 501 F.2d 1291, 1319-20 (5th Cir. 1974) (injunction establishing minimum standards for prison facilities); Plaquemines Parish School Bd. v. United States, 415 F.2d 817, 833 (5th Cir. 1969) (injunction requiring the establishment of certain school programs and the construction and maintenance of school facilities); Wyatt v. Stickney, 344 F. Supp. 373, 377-78 (M.D. Ala. 1973) (injunction ordering expenditure to raise standards of state mental institutions).

[163] Such relief is "in practical effect indistinguishable in many aspects from an award of damages against the State." Edelman v. Jordan, 415 U.S. 651, 668 (1974). *See generally* Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 686-87 (1976). The issue of pure damage suits is academic for purposes of § 1983. Specifically, the classic damage claim under this section alleges personal liability against the state officer and does not seek relief from the state. Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974). See section IV. *infra*.

[164] 415 U.S. 651 (1974).

[165] Also named as defendents were the county director of public aid and the county comptroller. *Id.* at 653.

[166] *Id.* at 656.

[167] *Id.* at 664.

[168] *Id.* at 665.

[169] *Id.* Rejecting the argument that little distinction exists between a prospective order and retroactive relief, Mr. Justice Rehnquist concluded:

> This argument neglects the fact that where the State has a definable allocation to be used in the payment of public aid benefits, and pursues a certain course of action . . . the subsequent ordering by a federal court of retroactive payments . . . will invariably mean there is less money available for payment for the continuing obligations [incurred].

Id. at 666 n.11.

"ancillary [fiscal] effect [was] permissible and . . . an inevitable consequence"[170] of the action. Retroactive relief, however, was deemed to be "in essence [seeking direct] recovery of money from the state"[171] therefore falling within the prohibition of the eleventh amendment.[172]

The *Edelman* approach focuses solely on the inevitable expenditure of funds directly from a state treasury. Subsequently, in *Mt. Healthy City School District Board of Education v. Doyle*,[173] the Court faced a claim by a teacher seeking back pay from a school board.[174] The board advanced an *Edelman* defense, arguing that it shared the state's eleventh amendment immunity inasmuch as it received a "significant amount of its money from the state."[175] Applying an analysis previously reserved for determining diversity jurisdiction,[176] the Court examined the "nature of the entity [as] created by state law"[177] and, finding a grant of extensive independent powers,[178] concluded that the school board was "more like a county or city than . . . an arm of the State."[179]

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[170] *Id.* at 668.

[171] *Id.* at 663, *quoting with approval* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945).

[172] The *Edelman* decision effectively discredited four previous affirmances of lower court holdings that the granting of retroactive benefits did not violate the eleventh amendment. State Dep't of Health & Rehabilitative Servs. v. Zarate, 407 U.S. 918 (1972), *aff'g* 347 F. Supp. 1005 (S.D. Fla. 1971); Sterrett v. Grubb, 400 U.S. 922, *aff'g* 315 F. Supp. 990 (N.D. Ind. 1970); Wyman v. Bowen, 397 U.S. 49 (1970), *aff'g* 304 F. Supp. 717 (N.D.N.Y. 1969); Shapiro v. Thompson, 394 U.S. 618 (1969), *aff'g* 270 F. Supp. 331 (D. Conn. 1967). The rationales employed to uphold such awards were quite diverse. *See* Comment, *Edelman v. Jordan: The Case of the Vanishing Retroactive Benefit and the Reappearing Defense of Sovereign Immunity*, 12 Hous. L. Rev. 891, 899-903 (1975). For example, the Fifth Circuit had held that an order granting retroactive benefits was not an award of damages but an "inextricable part of the restoration to prior status" and an "integral part of the equitable remedy" contemplated in *Ex parte Young*. Harkless v. Sweeny Independent School Dist., 427 F.2d 319, 324 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); *see* Gates v. Collier, 489 F.2d 298, 302-03 (5th Cir. 1973) (attorneys' fees assessed against state as integral part of injunctive remedy with effect on state treasury deemed ancillary), *vacated and remanded en banc*, 522 F.2d 81 (5th Cir. 1975).

[173] 97 S. Ct. 568 (1977).

[174] *Id.* at 570.

[175] *Id.* at 573.

[176] While a state is not a "citizen" for purposes of diversity jurisdiction, Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1894), political subdivisions of the state will be deemed "citizens" unless the facts establish that they are in reality nothing more than an "arm" or "alter ego" of the state. *Compare* State Highway Comm'n v. Utah Constr. Co., 278 U.S. 194, 199 (1929) (highway commission is "alter ego" of state for diversity purposes) *with* Bullard v. City of Cisco, 290 U.S. 179, 187 (1933) (diversity suit against city). In Moor v. County of Alameda, 411 U.S. 693 (1973), the county argued that it could not be subjected to a diversity suit because

> unlike the counties of most States, it [was] not a municipal corporation or an otherwise independent political subdivision, but that it [was], under California law, nothing more than an agent or a mere arm of the State itself.

Id. at 718-19. Rejecting this argument, the Court identified several factors which tend to establish the type of "local control" upon which a finding of diversity "citizenship" can be predicated:

Any discussion of the Fifth Circuit's analysis of the defense begins and ends with the proposition that the state, its agencies and all governmental subdivisions are included within the holding of *Muzquiz*, *i.e.* they are "nonpersons" for purposes of section 1983.[180] Thus, any suit which names responsible officials of the governmental entity in their official capacity seeking retroactive benefits or damages from the entity is barred.[181] In this posture, the availability of an eleventh amendment defense is irrelevant. Assuming an alternative basis of jurisdiction, *e.g.*, 28 U.S.C. § 1331,[182] however, the Fifth Circuit's approach does become relevant. Although there are a number of decisions tracking the source of funding as the determinative factor,[183] the circuit developed its own tripartite test well in advance of *Mt. Healthy*:

> Most notably, under California law a county is given "corporate powers" and is designated a "body corporate and politic." In this capacity, a county may sue and be sued, and, significantly for purposes of suit, it is deemed to be a "local public entity" in contrast to the State and state agencies. In addition, the county . . . is liable for all judgments against it and is authorized to levy taxes to pay such judgments.

Id. at 719 (footnotes omitted).

[177] 97 S. Ct. at 572.

[178] *Id.*

[179] *Id.* Critical to the finding was the fact that local school boards were independent "political subdivisions," empowered to issue bonds and to levy taxes. *Id.* Although *Mt. Healthy* complicates the issue of eleventh amendment immunity, its analysis accords with the limited availability of the defense. See note 159 and accompanying text *supra*. Under a strict *Edelman* approach, any state deciding to employ direct funding for local entities such as schools could generate an immunity which, but for *Mt. Healthy*, would fall within the parameters of the eleventh amendment. *Cf.* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 126-30 (1973) (Marshall, J., dissenting) (discussing "local control" in the context of state funding of school systems); Gates v. Collier, 489 F.2d 298, 302 & n.2 (5th Cir. 1973) (equitable monetary relief permitted even though named defendants would be "bailed out" by the state), *vacated and remanded en banc*, 522 F.2d 81 (5th Cir. 1975); Tribe, *supra* note 163, at 687 n.5 (indemnification agreement by state may constitute waiver of eleventh amendment immunity).

[180] See notes 58 through 69 and accompanying text *supra*.

[181] See notes 81 through 85 and accompanying text *supra*.

[182] See note 86 *supra*.

[183] Houston Welfare Rights Organization, Inc. v. Vowell, 555 F.2d 1219, 1227 (5th Cir. 1977) (eleventh amendment applicable to suit requesting retroactive AFDC benefits from state treasury); Adams v. Rankin County Bd. of Educ., 524 F.2d 928, 929 (5th Cir. 1975) (per curiam) ("locally" controlled school board supported by county revenues not entitled to immunity), *petition for cert. filed,* 45 U.S.L.W. 3057 (U.S. May 21, 1976) (No. 75-1710); Hander v. San Jacinto Junior College, 519 F.2d 273, 279 (5th Cir.) (per curiam) (supplementation of budget with local funds precludes access to immunity defense), *clarified on rehearing,* 522 F.2d 204 (5th Cir. 1975); Schiff v. Williams, 519 F.2d 257, 262 (5th Cir.

> [T]he Eleventh Amendment does not bar awards so long as the entities sued are [1] locally controlled, [2] essentially local in character, and [3] the funds to defray the award would not be derived *primarily* from the state treasury.[184]

While not yet faced with a fact situation presenting the issue, the potential exists under this test for an obviously definable "local" entity to assume eleventh amendment proportions if the state is the "primary" funding entity.[185] Such a result would obviously be inconsistent with the teachings of *Mt. Healthy.*[186] Accordingly, a disjunctive rather than conjunctive analysis by the circuit would be more appropriate.

III. State Action

The second major prerequisite for a section 1983 claim is that the defendant must act "under color of" state law. This requirement—the state action nexus—[187] also received its basic working definition in

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1975) (student editor's suit for back pay not barred by immunity where award would be paid from student rather than state funds).

[184] Campbell v. Gadsden County Dist. School Bd., 534 F.2d 650, 656 (5th Cir. 1976) (emphasis added).

[185] *Id.*

[186] See note 179 *supra*. The latest circuit decision employing the test is Jagnandan v. Giles, 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 97 S. Ct. 2959 (1977). The plaintiffs sought, *inter alia*, to recover tuition paid to a state university pursuant to a Mississippi statute classifying all aliens as "nonresidents" for fee computation purposes. 538 F.2d at 1169 & n.2. Although the suit was brought under § 1983, the court did not discuss the *Muzquiz* issue, *i.e.* the availability of relief from the pocket of a nonperson, and examined at length the statutory and judicial *status* of the university and board of trustees within the state. Finding them to be inextricably involved with the state itself, *id.* at 1174-76, and that the judgment would be paid from state funds, the court concluded that the defendant's eleventh amendment defense was properly invoked. *Id.* at 1176.

[187] The term is synonymous with "under color of state law." Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873, 877 n.7 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975); Parish v. NCAA, 506 F.2d 1028, 1031 n.6 (5th Cir. 1975); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 Colum. L. Rev. 656, 656 n.4 (1974). *But cf.* Adickes v. S.H. Kress & Co., 398 U.S. 144, 188-89 (1970) (Brennan, J., expressing the view that the concept of "state action" is broader than "under color of state law"). The statutory reference to "under color of . . . custom or usage" has received minimal judicial attention. *See id.* at 167 (delineating a "force of law" requirement).

For fourteenth amendment purposes, the requirement of state involvement, while questioned by some members of the present Court, *e.g.*, United States v. Guest, 383 U.S. 745, 782-86 (1966) (Brennan, J., concurring in part and dissenting in part) (§ 5 of the fourteenth amendment gives Congress the power to enact legislation which reaches private conspiracies), was spawned by The Civil Rights Cases, 109 U.S. 3 (1883). Over Justice Harlan's lone dissent, the Court there found that "[i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment." *Id.* at 11. Accordingly, *Monroe*:[188] Violations of constitutional rights by any person "clothed with the authority of state law"[189] are actionable under section 1983. This standard, mechanically applied in *Monroe* to determine whether the defendant was a state officer,[190] assumes intricate ramifications in

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> "[i]t has been settled for nearly one hundred years that the proscription of the Fourteenth Amendment applies only to such action as may be attributed to the states, and does not inhibit, of its own force, the conduct of private individuals. The state action requirement of the Fourteenth Amendment is functionally equivalent to the requirement of § 1983 that the challenged conduct be 'under color of state law.' "

Ingram v. Steven Robert Corp., 419 F. Supp. 461, 463 (S.D. Ala. 1976) (citation omitted), *aff'd*, 547 F.2d 1260 (5th Cir. 1977).

[188] See note 53 and accompanying text *supra.*

[189] *Id.* at 184. Causes of action against federal officers acting pursuant to federal law are, by definition, excluded. Wheeldin v. Wheeler, 373 U.S. 647, 650 (1963); Roots v. Callahan, 475 F.2d 751, 752 (5th Cir. 1973) (per curiam); Walker v. Blackwell, 360 F.2d 66, 67 (5th Cir. 1966); Norton v. McShane, 332 F.2d 855, 862 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965). *But see* note 260 *infra* (conspiratorial conduct between state and federal officers provides sufficient predicate for § 1983 claim). Also excluded from the scope of § 1983 are those violations of state law by state officers which do not rise to constitutional proportions. Shields v. Hopper, 519 F.2d 1131, 1132 (5th Cir. 1975) (per curiam); McDowell v. Texas, 465 F.2d 1342, 1345-46 (5th Cir. 1972) (en banc) (per curiam), *cert. denied*, 410 U.S. 943 (1973).

[190] The defendant's possession or use of powers peculiar to his office is irrelevant to a determination of whether allegedly unconstitutional conduct meets the "under color of" requirement. Rather, the seminal question is whether the defendant was engaged in or was under the "pretense" of engaging in official duties. Williams v. United States, 341 U.S. 97, 98 (1951) (special deputy coerced confession during criminal investigation); United States v. Classic, 313 U.S. 299, 307 (1941) (state election officials engaged in election fraud). In Griffin v. Maryland, 378 U.S. 130 (1964), the defendant contended that an arrest of blacks for trespass did not constitute state action since the arresting party was acting in his capacity as an amusement park employee rather than as a special deputy. The Court, however, quickly rejected this claim.

> [I]n ordering the petitioners to leave the park and in arresting and instituting prosecutions against them [he] purported to exercise the authority of a deputy sheriff. He wore a sheriff's badge and consistently identified himself as a deputy sheriff rather than as an employee of the park. . . . If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law.

Id. at 135 (citation omitted); *accord*, Robinson v. Jordan, 494 F.2d 793, 795 (5th Cir. 1974) (per curiam) (private physician acted under color of law when treating prisoner in capacity as county health officer); Crews v. United States, 160 F.2d 746, 750 (5th Cir. 1947) (off-duty constable acted under color of law when arrestee taken "into custody in a manner which appear[ed] on its face to be in the exercise of" lawful authority); Delatte v. Genovese, 273 F. Supp. 654, 658 (E.D. La. 1967) (private physician performing role of coroner subject to § 1983 cause of action).

Recently, the Court granted certiorari in a case where an off-duty police officer killed two persons and disabled a third in a barroom fracas. The Court's desire to delineate the context of decisions penetrating the veil of seemingly private individual conduct in order to determine the existence of a nexus sufficient to satisfy the state action requirement.[191]

From an analytical standpoint, two situations where private conduct has been infused with state action can be ascertained.[192] First, one

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further the "under color of law" requirement is evident from the issue posited:

> Does the fact that an off-duty police officer, out of uniform, is required by police department regulation to carry a weapon at all times, establish that any use of that weapon against the person of another, *even though the officer is engaged in private conduct at the time,* to be an act "under color of law" within the meaning of 42 U.S.C. § 1983?

Belcher v. Stengel, 429 U.S. 118, 119 (1976) (per curiam) (emphasis added). At the conclusion of oral argument, the case was dismissed as an improvident grant, *id.* at 515, since subsequent actions by the state and the police department conclusively established that the officer acted in his official capacity. Specifically, the officer was paid workmen's compensation for injuries received and a board of inquiry determined that he acted in the line of duty. *Id.* at 514-15. Concurring in the dismissal, Mr. Chief Justice Burger commented on additional evidence supporting the Court's conclusions:

> (1) The officer testified that he had formed an intention that he would arrest at least two of the men when he stood up to intervene in the altercation; (2) he intervened by using a can of mace issued to him by the police department; (3) he was acting pursuant to a police regulation which required his intervention in any disturbance of the peace, whether he was on or off duty.

Id. at 515 (Burger, C.J., concurring).

[191] The subject has generated a significant volume of commentary. *See generally* Bassett, *The Reemergence of the "State Action" Requirement in Race Relations Cases,* 22 Cath. U.L. Rev. 39 (1972); Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection,* 1967 Sup. Ct. Rev. 39; Silard, *A Constitutional Forecast: Demise of the "State Action" Limitation on the Equal Protection Guarantee,* 66 Colum. L. Rev. 855 (1966); Note, *supra* note 187, at 656; Note, *State Action and the Burger Court,* 60 Va. L. Rev. 840 (1974); 47 Miss. L.J. 1011 (1976).

[192] This is not, of course, an assertion that these categories occupy a monopoly position. As a practical matter, certain decisions must be viewed as *sui generis. E.g.,* Gilmore v. City of Montgomery, 417 U.S. 556, 566-74 (1974) (state action vis-à-vis aid to racially discriminatory private schools); Norwood v. Harrison, 413 U.S. 455, 468-71 (1973) (state action in the form of textbooks loaned to racially discriminatory private schools); Shelley v. Kraemer, 334 U.S. 1, 20-23 (1948) (state court enforcement of restrictive covenants against prospective black land purchasers held to be state action); *cf.* Reitman v. Mulkey, 387 U.S. 369, 374-81 (1967), discussed at note 209 *infra.* Any analysis of the subject must, however, bear in mind that "[t]he Burger Court has apparently halted [the] expansive trend" of state action established during the Warren era. Note, *State Action and the Burger Court, supra* note 191, at 841.

The Fifth Circuit also has generated a line of cases which defy simple categorization. For example, the court frequently confronts the question of whether counsel for a criminal defendant may, after conviction, be subjected to a § 1983 suit by the ex-client. While its basic approach is that § 1983 "was never intended [to provide] a vehicle for prosecuting malpractice suits," O'Brien v. Colbath, 465 F.2d 358, 359 (5th Cir. 1972) (per curiam), this issue is now resolved by the "color of law" requirement and the conclusion that neither a court-appointed attorney nor a public defender are state functionaries.

line of authorities finds the requisite state action where private persons assume governmental powers or functions. Second, a broad range of cases reaches a similar conclusion when the state has significantly involved itself in private conduct.

A. Private Performance of Governmental Functions

The "public function" doctrine[193] has traditionally been used to impute state action to private conduct when a private party undertakes to perform a governmental activity. Thus a "company town" restricting first amendment rights,[194] a private park excluding blacks[195] and private organizations carrying on delegated functions with respect to the electoral process[196] were found to have acted as "the state" and therefore subject to the fourteenth amendment. The present Court, however, has demonstrated a distinct propensity to restrict expansion of the doctrine.

In 1968, an analogy was drawn between shopping centers and company towns.[197] Eight years later, however, in *Hudgens v. NLRB*,[198] it explained that although these entities do perform a number of municipally-related functions, owners of private property must assume

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> The court-appointed attorney [as a public defender], like any retained counsel, serves his client. He represents the client, not the state. The ancillary facts that the court has a hand in providing counsel, and that the attorney selection board . . . obtains its authority from statute, do not alter the attorney-client relationship.

United States *ex rel.* Simmons v. Zibilich, 542 F.2d 259, 261 (5th Cir. 1976) (per curiam). *See also* Nelson v. Stratton, 469 F.2d 1155, 1155 (5th Cir. 1972) (per curiam) (retained counsel), *cert. denied,* 410 U.S. 957 (1973); O'Brien v. Colbath, 465 F.2d 358, 359 (5th Cir. 1972) (per curiam) (public defender); Sullens v. Carroll, 446 F.2d 1392, 1392 (5th Cir. 1971) (per curiam) (court-appointed counsel).

[193] *See generally* 47 MISS. L.J. 1011, 1013 (1976).

[194] In Marsh v. Alabama, 326 U.S. 501 (1946), a Jehovah's Witness was arrested and subsequently convicted of criminal trespass after refusing to cease distributing literature on a sidewalk in Chickasaw, Alabama. Chickasaw, a so-called "company town," was owned by the Gulf Shipbuilding Corporation. Despite corporate ownership, the Court found that the property assimilated all the attributes of a town and, for purposes of state action, did not "function differently" from any other town." *Id.* at 508.

[195] In Evans v. Newton, 382 U.S. 296 (1966), a private park was devised to a municipality subject to the restriction that it be maintained for whites only. Noting that "the predominant character and purpose of [the] park [was] municipal," the court held that its maintenance was subject to fourteenth amendment strictures. *Id.* at 302.

[196] Terry v. Adams, 345 U.S. 461, 470 (1953) (county political organization); Nixon v. Condon, 286 U.S. 73, 89 (1932) (executive committee of state political party).

[197] Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308, 313-15 (1968) (first amendment protects picketing of shopping center store). *But see* Lloyd Corp. v. Tanner, 407 U.S. 551, 567-70 (1972) (restriction of exercise of first amendment rights unrelated to operation of shopping center situs did not constitute state action).

[198] 424 U.S. 507 (1976).

" 'the full spectrum of municipal powers and [stand] in the shoes of the State' "[199] before the public function doctrine is applicable.[200] During this same period, the Court also availed itself of an opportunity to place its prior decisions within a framework limited to finding state action by a private entity only where it engaged in activities "traditionally exclusively reserved to the State."[201] In *Jackson v. Metropolitan Edison Co.*,[202] the contention that a private power company holding monopoly status[203] fit within the doctrine for purposes of generating the requisite state action nexus met cursory rejection.

> If we were dealing with the exercise by [the private company] of some power delegated to it by the State which is *traditionally associated with sovereignty,* such as eminent domain, our case would be quite a different one. But while the [state] statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State. The [state] courts have rejected the contention that the furnishing of utility services is either a state function or a municipal duty.[204]

Although several early decisions by the Fifth Circuit adopted an expansive, liberalized view of the doctrine,[205] the current approach reflects the sharp adjustment mandated by the Supreme Court.[206] The only outstanding exception to this restrictive approach is *Hall v. Garson*[207] where the court found state action in self-help repossession. The broad holding in *Hall*, however, is now limited[208] to statutorily-

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[199] *Id.* at 519, *quoting* Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972).

[200] 424 U.S. at 519.

[201] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974).

[202] 419 U.S. 345 (1974).

[203] Which, for purposes of finding "state action," the Court found to be irrelevant. *Id.* at 351-52.

[204] *Id.* at 352-53 (emphasis added). The Court also rejected the argument that since the utility was highly regulated, it was "affected with the public interest" and therefore was a "state actor" in carrying out its business. *Id.* at 353.

> Doctors, optometrists, lawyers . . . are all in regulated businesses, providing arguably essential goods and services, "affected with a public interest." We do not believe that such a status converts their every action, absent more, into that of the State.

Id. at 354 (footnote omitted).

[205] *See, e.g.,* Boman v. Birmingham Transit Co., 280 F.2d 531, 535 (5th Cir. 1960) (private transit company); Derrington v. Plummer, 240 F.2d 922, 925-26 (5th Cir. 1956) (private restaurant in courthouse), *cert. denied,* 353 U.S. 924 (1957). The early circuit position on the issue was best stated in Baldwin v. Morgan, 287 F.2d 750 (5th Cir. 1961), a suit challenging segregated waiting rooms maintained by a railroad pursuant to state law. "When private individuals or groups are endowed by the State with powers or functions governmental in nature they become instruments of the State . . . ." *Id.* at 755 n.9.

A case obviously in accord with existing precedent is Petersen v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973), where a migrant labor camp provided numerous facilities and services, including streets, stores, eating facilities, a post office, fire protection, and sewage and garbage disposal. Adhering to Marsh v. Alabama, 326 U.S. 501 (1946), see note 194 *supra,* the circuit found the public function doctrine applicable to the plaintiffs' claim that their first amendment rights were violated by the defendant's actions in restricting access to the facility and its occupants. 478 F.2d at 82.

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[206] The circuit's acceptance of the limited utility of the doctrine is demonstrated by Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975), a dismissal of a suit against a "private" hospital prohibiting nontherapeutic abortions because, *inter alia*, the facility was not performing a traditional governmental function. 513 F.2d at 881-82. In Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975), however, Judge Thornberry employed an independent analysis to reflect upon the status of the National Collegiate Athletic Association:

> [I]t would be strange doctrine indeed to hold that the states could avoid the restrictions placed upon them by the Constitution by banding together to form or to support a "private" organization to which they have *relinquished some portion of their governmental power*. . . . We have little doubt, in light of the national . . . scope of collegiate athletics and the *traditional* governmental concern with the educational system, *that were the NCAA to disappear tomorrow, government would soon step in to fill the void.*

Id. at 1033 (emphasis added). Obviously, the relinquishment of governmental power to a private party fits the current public function mold *if* the delegated activity previously has been within the state's exclusive prerogative. Any expansion of the doctrine to those functions the government *would assume* if the private sector defaulted, however, is unwarranted. The opinion's deference to those aspects of society of "traditional governmental concern" as having some bearing on a state action determination is also without precedent. See note 204 *supra*.

[207] 430 F.2d 430 (5th Cir. 1970). In *Hall*, suit was instituted against a landlord who forcibly entered the plaintiff's dwelling and seized his television. The seizure was conducted pursuant to a Texas statutory scheme which authorized a landlord to seize a tenant's property "until [any] amount of . . . unpaid rent [was] paid." *Id.* at 432 n.1. Writing for the panel, Chief Judge Brown found state action through a "public function" analysis:

> [T]he action taken, the entry into another's home and the seizure of . . . property, was an act that possesses many, if not all, of the characteristics of an act of the State. The execution of a lien, whether a traditional security interest or a quasi writ of attachment or judgment lien has in Texas *traditionally been the function of the Sheriff or constable.*

Id. at 439 (emphasis added); *accord*, Johnson v. Riverside Hotel, Inc., 399 F. Supp. 1138, 1140-41 (S.D. Fla. 1975) (summary seizure of transient guest's property by motel owner held to be state action).

[208] The gradual demise of *Hall* was initiated by James v. Pinnix, 495 F.2d 206 (5th Cir. 1974), where the plaintiff challenged a private repossession of his automobile under Mississippi's equivalent to § 9-503 of the Uniform Commercial Code. No state action was found and the court distinguished *Hall* on several grounds: (1) there was a purchase-money security interest in the property seized; (2) the activity had been "traditionally" performed by private persons; and (3) there was no entry into a dwelling. *Id.* at 208; *accord*, Baker v. Keeble, 362 F. Supp. 355, 357 (M.D. Ala. 1973), *aff'd sub nom.*, Brantley v. Union Bank & Trust Co., 498 F.2d 365, 366 (5th Cir.), *cert. denied*, 419 U.S. 1034 (1974) (automobile repossession under § 9-503 as incorporated into Alabama Code not state action).

The "self-help" repossession issue was raised again in Calderon v. United Furniture

Co., 505 F.2d 950 (5th Cir. 1974) (per curiam), where operatives of the corporate defendant repossessed a washing machine following an unauthorized entry into the plaintiff's home. Rejecting the method of repossession as a key to the finding of state action, the court concluded that the "under color of" requirement is not met by a statutorily authorized seizure of property "whose purchase has created the [unpaid] debt and in which the seizor has a security interest." *Id.* at 951.

This series of repossession cases terminates with Judge Wisdom's opinion in Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166 (5th Cir. 1975), a case involving a statutory, nonjudicial foreclosure of real property. Finding no state action, the court limited *Hall* to action taken which " 'resembles a seizure and satisfaction of a judgment—a function traditionally performed by a sheriff.' " *Id.* at 1172, *quoting* James v. Pinnix, 495 F.2d 206, 208 (5th Cir. 1974).

> Here, [in] contrast [to *Pinnix*], no state statute *creates* [as opposed to merely authorizing] a right in mortgagees to proceed by non-judicial foreclosure; the right is created by contract. Moreover, the action taken . . . cannot be described *as a function that has been traditionally the exclusive prerogative of the state.*

519 F.2d at 1172 (emphasis added).

The circuit's conclusion that state action is not involved in the self-help repossession of property encumbered by a security interest is in accord with other circuits. *E.g.*, Turner v. Impala Motors, 503 F.2d 607, 611-12 (6th Cir. 1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16, 17 (8th Cir.) (per curiam), *cert. denied*, 419 U.S. 1006 (1974). See Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 47 S. CAL. L. REV. 1, 52-53 (1973). A statutorily authorized seizure of goods bearing no relation to the debt itself, however, presents a conflict. *Compare* Culbertson v. Leland, 528 F.2d 426, 432 (9th Cir. 1975) (seizure of tenant's property pursuant to "Innkeeper's Lien Statute" held to be state action) *with* Anastasia v. Cosmopolitan Nat'l Bank, 527 F.2d 150, 154-58 (7th Cir. 1975) (enforcement of landlord's lien held to be traditional private remedy), *cert. denied,* 424 U.S. 928 (1976) *and* Davis v. Richmond, 512 F.2d 201, 205 (1st Cir. 1975) (rejects *Hall* in case of lien enforcement by landlord). *See also* Parks v. "Mr. Ford," 556 F.2d 132, 133-43 (3d Cir. 1977) (en banc) (detailed analysis of the conflicting issues and approaches).

It is clear, of course, that private seizures under state law *utilizing the state's judicial system* presents a scenario providing a sufficient state nexus for purposes of § 1983. *See, e.g.*, North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 605-08 (1975) (court clerk issued writ of replevin); Fuentes v. Shevin, 407 U.S. 67, 92-93 (1972) (same); Sniadach v. Family Fin. Corp., 395 U.S. 337, 339-42 (1969) (court clerk issued summons of garnishment). However,

> [t]here is no cause of action under [§ 1983] if a case is private litigation in which the state does no more than furnish the forum and has no interest in the outcome.

Hill v. McClellan, 490 F.2d 859, 860 (5th Cir. 1974) (per curiam); *see* Howard v. Lemmons, 547 F.2d 290, 290-91 (5th Cir. 1977) (per curiam) (no cause of action against private party who files affidavit to initiate criminal prosecution); Curry v. Ragan, 257 F.2d 449, 450 (5th Cir.) (per curiam) (no § 1983 cause of action for malicious prosecution), *cert. denied*, 358 U.S. 851 (1958); Dinwiddie v. Brown, 230 F.2d 465, 469 (5th Cir.) (per curiam) ("allegation of the obtaining of a fraudulent judgment by private individuals" does not state a § 1983 cause of action), *cert. denied*, 351 U.S. 971 (1956). *But cf.* Nesmith v. Alford, 318 F.2d 110, 126 (5th Cir. 1963) (§ 1983 can form the basis for a cause of action against police officer for malicious prosecution), *cert. denied*, 375 U.S. 975 (1964); Wyland v. James, 426 F. Supp. 304, 306 (N.D. Tex. 1977) (same). Judicial enforcement of laws *requiring or forbidding* certain actions obviously produces a contrary result. *E.g.*, Stanton v. Stanton, 421 U.S. 7 (1975).

authorized[209] seizures of: (1) "property whose purchase [has not] created the debt and in which the seizor [does not] have a security interest;"[210] and which (2) has been "traditionally exclusively reserved to the state."[211]

B. State Involvement

The "state action" requirement is also met when a high degree of state involvement is present in the private conduct. This category is best described as part of a "dynamic process, [where] the boundaries between [state and private conduct] shift and are adumbrated by the various factual situations which are presented for review."[212] Although the Supreme Court itself acquiesces in the conclusion that the development of a precise formula is an "impossible task,"[213] the mandate for lower courts to engage in the "sifting of facts and weighing of circumstances"[214] remains the touchstone. This amorphous balancing process is best analyzed in terms of the *type* of state involvement as opposed to the degree of state activity sufficient to trigger a section 1983 action against a private individual or entity.

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[209] Where state authorization is at issue, a proper interpretation of Reitman v. Mulkey, 387 U.S. 369 (1967), is necessary. The case involved an amendment to the California Constitution which authorized private discrimination with respect to the purchase and sale of real property. Although it was facially neutral, the provision was held invalid since it, and therefore the state, *affirmatively authorized* unconstitutional conduct. *Id.* at 381. In Hall v. Garson, 430 F.2d 430 (5th Cir. 1970), Chief Judge Brown conceded that *Reitman* could literally be applied to generate state action for all otherwise private, individual conduct authorized by state statute, *i.e.* a § 1983 cause of action is by definition maintainable against "every person who [acts] under color of any *statute*." *Id.* at 439 n.20. However, in James v. Pinnix, 495 F.2d 206 (5th Cir. 1974), Judge Godbold reasoned that although self-help repossession statutes "back up" and therefore promote private conduct, any expansion of *Reitman* beyond the race arena would be an unacceptable expansion of the state action "frontier" established by the decision. *Id.* at 208. Finally, in Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166 (5th Cir. 1975), Judge Wisdom, after noting that the private act in question—nonjudicial foreclosure—was statutorily authorized, concluded:

> That the state merely recognizes the legal effect of such private arrangements does not convert them into state acts for Fourteenth Amendment purposes . . . . Virtually all formal private arrangements assume, at some point, the supportive role of the state. To hold that the state, by recognizing the legal effect of those arrangements, converts them into state acts for constitutional purposes would effectively erase . . . the constitutional line between private and state action and subject to judicial scrutiny . . . virtually all private arrangements.

Id. at 1170. *But see* note 208 *supra* (state action in the context of mandatory state laws). *Cf.* J.L. v. Parham, 412 F. Supp. 112 (M.D. Ga. 1976), *prob. juris. noted sub nom.*, Parham v. Minor, 45 U.S.L.W. 3777 (U.S. May 31, 1977) (No. 75-1690) (issue of whether parents' voluntary placement of child in state institution pursuant to state law is state action).

[210] Calderon v. United Furniture Co., 505 F.2d 950, 951 (5th Cir. 1974) (per curiam).

[211] Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166, 1172 (5th Cir. 1975).

[212] Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873, 878 (5th Cir.), *cert. denied,* 423 U.S. 1000 (1975) (footnote omitted). The logic of Supreme Court decisions attempting to resolve the issue has drawn mixed reviews from individual members of the circuit. For example, Judge Wisdom has concluded that "[t]his question [*i.e.* what constitutes state action], is more easily stated than resolved. State involvement in undertakings otherwise private is protean and elusive." Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166, 1169 (5th Cir. 1975). On the other hand, Judge Coleman believes that the Court has "carefully surveyed the [state action] field and [has] articulated principles." Golden v. Biscayne Bay Yacht Club, 530 F.2d 16, 18 (5th Cir.), *cert. denied*, 429 U.S. 872 (1976).

1. Regulatory Nexus

A direct nexus between the injurious conduct and a state regulatory agency is sufficient to satisfy the state action requirement. In *Public Utilities Commission v. Pollack*,[215] the Commission specifically approved the practice of piping music into the cars of a privately-owned transit system. This direct involvement provided the necessary state action to support a section 1983 claim[216] challenging the practice as a violation of the riders' first amendment rights, *i.e.* the challenged "private" conduct was directly connected to action by the state. Absent this *type* of direct connection, no amount of regulation with respect to other segments of a private business' activities will constitute state action. Thus, in *Moose Lodge No. 107 v. Irvis*,[217] a section 1983 claim alleging race discrimination failed the state action test because the state regulatory activity—liquor licensing—played "no part in establishing or enforcing . . . guest policies."[218] Similarly, in *Jackson v. Metropolitan*

Assuming the most optimistic stance, Chief Judge Brown has remarked:

> We are not left to "flounder blindly" in determining if the state is significantly present on the side of alleged impermissible deprivation of a secured right. The Supreme Court has many times explored this area and exhorted words of wisdom for our guidance. . . . [I]t would appear that our task has been simplified.

Fulton v. Hecht, 545 F.2d 540, 542 (5th Cir.), *cert. denied*, 97 S. Ct. 1682 (1977).

[213] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

[214] *Id.*

[215] 343 U.S. 451 (1952).

[216] The case arose in the District of Columbia which, over 20 years later, was held not to be a "State or Territory" for purposes of § 1983. District of Columbia v. Carter, 409 U.S. 418, 432 (1973).

[217] 407 U.S. 163 (1972).

[218] *Id.* at 175. State involvement was found, however, with respect to a state liquor board regulation which required "[e]very club licensee [to] adhere to all the provisions of its Constitution and Bylaws." *Id.* at 177.

> The effect of this particular regulation on Moose Lodge under the provisions of the constitution placed in the record . . . would be to place *state sanctions* behind its discriminatory membership rules, but not behind its [contested] guest practices, which were not embodied in the constitution of the lodge.

Id. at 178 (emphasis added).

Edison Co.,[219] a finding that the state utilities commission exercised no control over the activity which gave rise to the cause of action—termination of service without notice and hearing—proved fatal to the state action allegation. In support of its conclusion, the Court explained:

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities . . . . [T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action and the regulated entity so that the action of the latter may be fairly treated as that of the State itself.[220]

The basic approach taken by the Court has been applied by the Fifth Circuit without variance in a number of related contexts.[221] However, because each decision turns on its individual facts,[222] a case-by-case review is necessary.

2. The "Symbiotic Relationship"

One step removed from direct state regulation of the activity prompting a section 1983 cause of action is the situation where the federal claim arises from a joint relationship between the state and a private entity. In *Burton v. Wilmington Parking Authority*,[223] a section

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[219] 419 U.S. 345 (1974).

[220] *Id.* at 350 (footnotes and citations omitted).

[221] The Fifth Circuit used this technique prior to its adoption by the Court. *See* Baldwin v. Morgan, 251 F.2d 780, 791 (5th Cir. 1958) (state action where private railroad segregated facilities pursuant to order of city public service commission). *See also* Peterson v. City of Greenville, 373 U.S. 244, 248 (1963) (nexus found where city ordinance required private lunch counter to refuse service to blacks).

[222] *E.g.*, Fulton v. Hecht, 545 F.2d 540, 542-43 (5th Cir.) (state regulation of dog track, unrelated to booking breeder contracts, insufficient to generate state action), *cert. denied*, 97 S.Ct. 1682 (1977); United Spaces, Inc. v. Federal Home Loan Bank, 535 F.2d 332, 333 (5th Cir. 1976) (per curiam) (no allegations relating to state regulation or participation in alleged unconstitutional behavior); Goodloe v. Davis, 514 F.2d 1274, 1276 (5th Cir. 1975) (state action where private baseball league enforced discriminatory policy of city); Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873, 881 (5th Cir.) (no state action where extensive county regulation unrelated to denial of elective abortions), *cert. denied*, 423 U.S. 1000 (1975); Blouin v. Loyola Univ., 506 F.2d 20, 22 (5th Cir. 1975) (per curiam) (state licensing of private university insufficient to generate state action in suit arising from professor's termination); Millenson v. New Hotel Monteleone, Inc., 475 F.2d 736, 737 (5th Cir.) (per curiam) (no state action where sex discrimination by hotel bar unrelated to state licensing), *cert. denied*, 414 U.S. 1011 (1973); Ingram v. Dunn, 383 F. Supp. 1043, 1048-49 (N.D. Ga. 1974) (discrimination by private credit union not related to regulation by Department of Banking and Finance), *aff'd*, 514 F.2d 1070 (5th Cir. 1975).

[223] 365 U.S. 715 (1961).

1983 action challenged the discriminatory practices of a private restaurant which leased space from a state agency. The Court held that the "under color of law" requirement was met since the record revealed that the state derived substantial benefit from the lease[224] as well as having the primary responsibility for the upkeep and maintenance of the property.[225]

> By its inaction [with respect to the discrimination practiced], the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.[226]

In the 1960's, several Fifth Circuit decisions involving racial discrimination demonstrated a high degree of sensitivity to *Burton* by finding state action in situations which presented joint relationships similar, but not identical, to the economic interdependence scenario.[227]

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[224] *Id.* at 719, 723.

> To secure additional capital needed for its "debt-service" requirements, and thereby to make bond financing practicable, the Authority decided it was necessary to enter long-term leases with responsible tenants for commercial use of the space available . . . .

Id. at 719.

[225] *Id.* at 720.

[226] *Id.* at 725. As subsequently interpreted by the Court:

> [T]he private lessee obtained the benefit of locating in a building owned by the state-created parking authority, and the parking authority was enabled to carry out its primary public purpose of furnishing parking space by advantageously leasing portions of the building constructed for that purpose to commercial lessees.

Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972); *accord,* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357-58 (1974) ("position of interdependence with the restaurant [such] that it [became] a joint participant in the enterprise"); *cf.* Evans v. Newton, 382 U.S. 296, 301 (1966) (state action where "municipality [was] entwined in the management or control of [a private] park").

The joint relationship required for purposes of state action is easily distinguishable from a nexus with the state based solely on state taxation and regulation. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 (1974) (no state action based solely on taxation and regulation); *accord,* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175-77 (1972) (licensing and taxation of private club insufficient in the *Burton* sense to generate state action for claim of racial discrimination).

[227] The circuit's decision in Derrington v. Plummer, 240 F.2d 922, 925-26 (5th Cir. 1956) (§ 1983 cause of action based on discriminatory practices held maintainable against a private restaurant leasing space in a county courthouse), *cert. denied,* 353 U.S. 924 (1957), was cited with approval in *Burton.* 365 U.S. at 725. *See also* Hammond v. University of Tampa, 344 F.2d 951, 951 (5th Cir. 1965) (per curiam) (university's use of city

In keeping with this approach, subsequent decisions exhibited no reticence in finding state action when a joint relationship was shown. For instance, in *Adams v. Miami Police Benevolent Association, Inc.*,[228] state action was found in a suit against a private, segregated police association whose activities were "closely intertwined" with the city.[229] Similarly, the YMCA's use of city property to conduct city programs established the type of "joint relationship" sufficient for a finding of state action,[230] just as the level of intercourse between state-supported educational institutions and the NCAA rendered the latter subject to a section 1983 suit.[231] Despite its apparent expansion into a broad-based

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building and lease of municipal land sufficient for cause of action alleging discrimination); Wimbish v. Pinellas County, 342 F.2d 804, 806 (5th Cir. 1965) (leases by city of municipal golf courses held to be joint enterprises in light of control retained by lessor); Hampton v. City of Jacksonville, 304 F.2d 320, 323 (5th Cir.) (state action found in operation of golf courses sold by city on condition they be open to the public), *cert. denied*, 371 U.S. 911 (1962). *Compare* Wright v. City of Brighton, 441 F.2d 447, 453 (5th Cir.) (city's sale of building to segregated private school violated equal protection rights of class against whom the school discriminated), *cert. denied*, 404 U.S. 915 (1971) *with* United States v. Mississippi, 499 F.2d 425, 438 (5th Cir. 1974) (state leases of public lands rescinded since the transfers were for the use of segregated private academies).

One version of the circuit's test during this period is similar to the current Supreme Court approach to the quantum of proof necessary to prove a race discrimination claim under the equal protection clause. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555, 563 (1977) (disproportionate impact is insufficient to establish a violation absent "proof of racially discriminatory intent or purpose"); Washington v. Davis, 426 U.S. 229, 239-44 (1976) (same). As explained by the circuit:

> "No doubt a county may in good faith lawfully sell and dispose of its surplus property, and its subsequent use by the grantee would not be state action. Likewise, we think that *when there is no purpose* of discrimination, no joinder in the enterprise, or *reservation of control* by the county, it may lease for private purposes [its] property not used or needed for county purposes."

Hampton v. City of Jacksonville, 304 F.2d 320, 321-22 (5th Cir.), *cert. denied*, 371 U.S. 911 (1962) (emphasis added) (citation omitted).

[228] 454 F.2d 1315 (5th Cir.), *cert. denied*, 409 U.S. 843 (1972).

[229] The holding was based on the court's findings that the association: (1) held itself out as "the police"; (2) solicited contributions from the public using the name "police"; (3) operated a canteen in Miami police headquarters; (4) operated vending machines at the headquarters and used the city bulletin boards; (5) was represented at city commission meetings where it bargained for wages and terms of employment for Miami policemen; (6) was represented at staff meetings of the department where policy decisions were made; and (7) used department facilities to solicit members. 454 F.2d at 1317-18.

[230] Smith v. YMCA, 462 F.2d 634, 647 (5th Cir. 1972).

[231] Parish v. NCAA, 506 F.2d 1028, 1032 (5th Cir. 1975) (suit challenging a minimum grade requirement). The decision left open the question of whether a private college complying with NCAA requirements would be subject to suit under § 1983. Presumably, applying a *Metropolitan Edison* analysis, *i.e.* direct regulation of the practice challenged, the state action requirement would be met. For other instances of the *Burton* approach, see Goodloe v. Davis, 514 F.2d 1274, 1275 (5th Cir. 1975) (use of city property by private,

doctrine of general applicability, however, *Burton* has now been limited by two recent decisions.[232]

In *Greco v. Orange Memorial Hospital Corp.*,[233] suit was brought

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discriminatory summer baseball league); Warren v. National Ass'n of Secondary School Principals, 375 F. Supp. 1043, 1047 (N.D. Tex. 1974) (suit against private high school honorary society by expelled student; state action found since the society was "materially entwined with the operation of the public school," *e.g.*, use of facilities, service by faculty and staff on the governing council).

[232] Playing no role in determining the circuit position is the large number of cases which fail to establish a meritorious claim warranting a *Burton* analysis. *See, e.g.*, Bailey v. McCann, 550 F.2d 1016, 1019 (5th Cir. 1977) (licensing by private harness drivers' association); Fulton v. Hecht, 545 F.2d 540, 542 (5th Cir.) (licensing a private dog track), *cert. denied*, 97 S. Ct. 1682 (1977); United Spaces, Inc. v. Federal Home Loan Bank, 535 F.2d 332, 333 (5th Cir. 1976) (per curiam) (incorporation); Ford v. Harris County Medical Soc'y, 535 F.2d 321, 322-23 (5th Cir.) (per curiam) (county medical society), *cert. denied*, 97 S. Ct. 492 (1976); Anderson v. Louisiana Dental Ass'n, 372 F. Supp. 837, 838 (M.D. La.) (private medical associations with no funds from the state and no powers of suspension or revocation of licenses), *aff'd*, 502 F.2d 783 (5th Cir. 1974); Blouin v. Loyola Univ., 506 F.2d 20, 22 (5th Cir. 1975) (per curiam) (granting charter to private university); Millenson v. New Hotel Monteleone, Inc., 475 F.2d 736, 737 (5th Cir.) (per curiam) (licensing private bar), *cert. denied*, 414 U.S. 1011 (1973); Ingram v. Steven Robert Corp., 419 F. Supp. 461, 463 (S.D. Ala. 1976) (licensing to do business), *aff'd*, 547 F.2d 1260 (5th Cir. 1977); *accord*, Player v. Alabama Dep't of Pensions & Sec., 400 F. Supp. 249, 263 (M.D. Ala. 1975) (private child care institutions not an "inextricable partner" with the state since they were discrete entities existing independently, albeit with some "assistance"), *aff'd without opinion*, 536 F.2d 1385 (5th Cir. 1976).

The form of community action agencies and the various funding techniques under which they operate is a source of difficulty. In Hines v. Cenla Community Action Comm., Inc., 474 F.2d 1052, 1058 (5th Cir. 1973), such entities were referred to as private, nonprofit corporations whose involvement with the government is insufficient to give rise to fourteenth amendment state action. *Accord*, Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873, 876 n.3 (5th Cir.) (federal financial assistance alone does not bring "an otherwise private facility within the parameters of . . . section 1983"), *cert. denied*, 423 U.S. 1000 (1975). *But cf.* Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1084-85 (5th Cir. 1976) (Goldberg, J., dissenting) (criticizing majority's failure to address state action question and contending actions by university newspaper supported by non-waivable student fee—assimilated to a state tax—should be considered state action), *cert. denied*, 97 S. Ct. 1678 (1977).

In Robison v. Wichita Falls & North Tex. Community Action Corp., 507 F.2d 245 (5th Cir. 1975), the court reached the merits of a § 1983 claim without deciding the issue of state action. In dictum, however, the court explained:

> Congress provided that community action programs could take the form of public or private non-profit corporations or agencies of state and local governments. Given this diversity of form, we construe the Court's holding in *Hines* to mean that the particular association involved in that case was a private corporation and *not* that all community action groups are categorically private corporations for purposes of . . . Section 1983.

Id. at 251 (emphasis added). More recently, however, a panel decision, without citation to *Robison* or *Hines*, found state action by a community action agency on the basis of a complaint describing the defendant as a "joint federal, state, county, and local government program." Robinson v. Price, 553 F.2d 918, 920 (5th Cir. 1977).

[233] 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975).

against a nonprofit, tax-exempt hospital by a staff physician denied the right to perform nontherapeutic abortions. In contrast to the landlord-tenant relationship in *Burton,* the record in *Greco* revealed a wide-ranging interrelationship between the state and the private hospital: (1) the hospital was built on county-owned land;[234] (2) issuance of over $1 million in bonds necessary for construction had required voter approval;[235] (3) the land and building were leased to the private corporation on a 5-year basis at a nominal rental of $1 per year;[236] (4) four of the nine board members were property owners in the county;[237] and (5) the lease made the corporation subject to certain obligations to the county, such as provision of medical care for all residents including indigents, responsibility for all operating expenses, and compliance with certain requirements to assure continued receipt of federal funds.[238]

On appeal from a holding of no state action, only Judge Clark saw fit to place the obvious quid pro quo of the relationship into the *Burton* mold:

> [The county] and this hospital enjoy precisely the sort of symbiotic relationship defined in *Burton.* To their mutual advantage, the county furnished land, buildings and facilities while operation and supervision by the hospital board and medical staff provided the general county community with health services and provided priority medical care for the county's indigent citizens.[239]

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[234] *Id.* at 876.

[235] *Id.* County citizens paid eight and one-half cents of every tax dollar to retire the bonds and time warrants issued by the county commissioners. *Id.* Additional financing was provided by federal Hill-Burton funds pursuant to 42 U.S.C. § 291e (1970). *Id.*

[236] *Id.*

[237] *Id.* at 877. The remaining five members of the board were drawn from corporate life members, *i.e.* all persons contributing $1,000 to the corporation. *Id.*

[238] *Id.* at 876. The lease provided that the purpose of the hospital corporation was "to relieve [the] lessor of the responsibility and expense of operating a hospital." *Id.* Specifically, the hospital corporation agreed:

> (1) to operate the hospital as a non-profit institution and to furnish to the general public medical and surgical care subject to such terms and regulations as the lessee may prescribe; (2) to carry out the assurances required of the lessor in order to obtain federal funds and to relinquish possession of the hospital in the event it fails to adequately comply; (3) to have all equipment and supplies inventoried . . .; (4) to be responsible for the expense of the day to day operation and maintenance of the hospital; (5) to make additions to the hospital with the written consent of lessor and at its own expense; (6) to keep all appropriate insurance in effect; (7) to submit an annual audit to lessor and to furnish any information which lessor feels is necessary to inform the people of Orange County about the operation and financial condition of the institution; (8) to accept indigent patients certified by the lessor subject to the prior obligation to receive emergency cases.

Id.

[239] *Id.* at 882 (Clark, J., concurring).

In contrast, Judge Gewin's majority opinion found *Burton* "easily" distinguishable. Under one rationale, no "benefits [were] mutually conferred"[240] within a specific *Burton* framework requiring that the financial success of the joint venture be partially dependent on continuance of the activity giving rise to the cause of action.[241] Alternatively, where the state in *Burton* had retained the power to force the restaurant to operate in a nondiscriminatory manner, the county had reserved no power to override decisions with respect to medical care.[242] Overshadowing these fine lines drawn by the opinion, however, was the threshold fact that the "hospital [was] not accused of racial discrimination,"[243] a factor deemed of critical significance.

> The concepts developed in this area, explicitly supported by constitutional and legislative mandates, were necessarily broadly drawn in order to implement Congressional intent in circumstances of positive and frequent state obfuscation and delay. The potentially explosive impact of the application of state action concepts designed to ferret out racially discriminatory policies in areas unaffected by racial considerations [requires us] to define more precisely the applicability of the state action doctrine.[244]

Assuming arguendo that *Greco* requires a finer sifting of facts and circumstances when a claim of racial discrimination is before the court,[245] the circuit's subsequent en banc decision in *Golden v. Biscayne*

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[240] 513 F.2d at 880. The opinion did acknowledge, however, that "[t]here [were] unquestionably indirect benefits accruing to Orange County by virtue of the corporation's operation of the hospital." *Id.*

[241] *Id.* at 880.

> There is, however, no indication, as there was in Burton . . . that the benefits accruing to the county were directly attributable to the objectionable activities of a joint venturer. In *Burton* the financial success of the State's project depended at least in part upon the popularity and income of the . . . [r]estaurant. The restaurant owners believed that a policy of racial discrimination was necessary in order to ensure the maximum volume of business and the Authority . . . acquiesced in this policy.

Id.

[242] *Id.* at 881.

[243] *Id.* at 879.

[244] *Id.* For additional references to a more intensive search for state action in cases with racial overtones, *see, e.g.*, Smith v. Brookshire Bros., Inc., 519 F.2d 93, 97 (5th Cir. 1975) (per curiam) (Gee, J., dissenting), *cert. denied*, 424 U.S. 915 (1976); James v. Pinnix, 495 F.2d 206, 208 (5th Cir. 1974).

[245] The Ninth, Seventh, Third, Second and First Circuits are in accord with the Fifth. Parks v. "Mr. Ford," 556 F.2d 132, 137 (3d Cir. 1977) (en banc); Ascherman v. Presbyterian Hosp., 507 F.2d 1103, 1104-05 (9th Cir. 1974); Fletcher v. Rhode Island Trust Nat'l Bank, 496 F.2d 927, 931 (1st Cir. 1974); Doe v. Bellin Memorial Hosp., 479 F.2d 756, 761-62 (7th Cir. 1973); Grafton v. Brooklyn Law School, 478 F.2d 1137, 1142 (2d Cir. 1973).

Bay Yacht Club[246] raises serious doubts as to whether even this type of claim will now be sufficient to generate a broad reading of *Burton.* Harry Golden, a black, and David Fincher, a Jew, sought membership in the Biscayne Bay Yacht Club of Miami, Florida. The facilities used by the club were located on bay bottom land leased from the city at $1 per year. Undisputed findings of fact by the district court indicated that: (1) the lease was essential to the club's functioning;[247] (2) granting the lease " 'help[ed] relieve the accute (sic) shortage of *public* dock facilities existing in the City;' "[248] and (3) the lease incorporated city racial and religious nondiscrimination ordinances which the city failed to enforce.[249] The district court, applying a clear *Burton* rationale, found the requisite state action.[250] On appeal, an en banc court rejected the state action conclusion:

> As a matter of law and fact, [the record] fall[s] short of establishing that the City of Miami has so far insinuated itself into a position of interdependence with the club that it must be recognized as a joint participant in the internal membership policies of the club.[251]

The Sixth Circuit, however, is in conflict. O'Neill v. Grayson County War Memorial Hosp., 472 F.2d 1140, 1144 (6th Cir. 1973) (state action not "governed by the nature of the constitutional rights asserted"). *See also* Parks v. "Mr. Ford," 556 F.2d 132, 153-54 (3d Cir. 1977) (en banc) (Adams, J., concurring). This conflict, however, is minor compared to the issue of whether state action exists where private hospitals are subject to partial local control and receive both state and federal funds. *See* O'Neill v. Grayson County War Memorial Hosp., 472 F.2d 1140, 1143 (6th Cir. 1973) (facts virtually identical to *Greco*; state action found). Dissenting from the denial of certiorari in *Greco*, Mr. Justice White, joined by the Chief Justice, noted the conflict which he believed required resolution by the Court:

> [W]hether a private hospital largely funded by the state and federal governments, partly controlled by the state government and the policymaking body of which is chosen by members of the community [meets the state action requirement].

Greco v. Orange Memorial Hosp. Corp., 423 U.S. 1000, 1000 (1975).

One step removed is the question of whether receipt of federal Hill-Burton funds by private hospitals alone is sufficient to generate state action. Again, the circuits are in conflict. *See* Taylor v. St. Vincent's Hosp., 424 U.S. 948 (1976) (Mr. Justice White, joined by the Chief Justice, dissenting from denial of certiorari on the issue). Although the circuit has no case directly addressing the issue, *Greco*, by definition, should preclude a finding of state action absent a claim of discrimination. *But see* Sosa v. Board of Managers, 437 F.2d 173, 174 (5th Cir. 1971) (irrelevant factor of receipt of Hill-Burton funds by county hospital noted in finding of state action).

[246] 530 F.2d 16 (5th Cir.), *cert. denied,* 429 U.S. 872 (1976), *noted in* 47 MISS. L.J. 1011 (1976). As the case was presented to the court of appeals, only the § 1983 issue remained since no cross appeal was taken with respect to the district court's failure to assert or find alternative jurisdiction under other provisions of the Civil Rights Act, *e.g.*, 42 U.S.C. § 1981. 530 F.2d at 17 n.1.

[247] 370 F. Supp. 1038, 1040 (S.D. Fla. 1973).

[248] *Id.* at 1040.

[249] *Id.*

[250] *Id.* at 1042.

[251] 530 F.2d at 22.

Chief Judge Brown's dissent, however, found *Burton* state action and attacked the majority opinion as an implicit rejection of prior circuit and Supreme Court precedents.[252]

> Today the Court opens the door to subterfuge because well within the bounds of this opinion, a governmental entity may accomplish indirectly what it could never do directly by leasing public property to a private segregated organization and then disavowing any direct participation in the discriminatory membership policies.[253]

Certiorari was denied, with Justices Marshall and Brennan dissenting.[254]

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[252] Judge Brown concluded that the basic holding in *Golden* was "that the fact that a private club leases some of the property it uses from a governmental entity is not enough in itself to imbue the private club's discriminatory activities with 'state action.'" *Id.* at 33. He contended that "much more is involved than simple ownership and lease," *id.*, and argued that *Burton* was applicable because: (1) the lease was worth considerably more than the $1 per year; (2) the lease was grounded on an understanding that the club would be performing a "public purpose"—relieving crowded conditions at the public docks; and (3) the city was obligated to curtail discriminatory practices.

> [T]he cumulation of these considerations develops an image of "significant state involvement." For us, all the facts and circumstances lead to only one conclusion—the cumulation of the various aspects of the city-club relationship colors the club's policies of racial and religious discrimination with state action.

Id.

[253] *Id.* at 32. Partial retrenchment by one panel is signaled by Robinson v. Price, 553 F.2d 918, 920-21 (5th Cir. 1977), where the director of a community action agency was allegedly fired for racial and religious reasons. Noting the *Greco-Golden* line, the court found sufficient state involvement through funding and control to hold the defendant's actions to be "under color of law."

[254] 429 U.S 872 (1976). Finally, in looking back at *Golden*, one should bear in mind that the *Burton* issue is not the only intriguing aspect of the case. Gilmore v. City of Montgomery, 417 U.S. 556 (1974), established that cities could not grant "exclusive use" of recreational facilities to private segregated academies. *Golden* posed the question of whether the concept applies to the city of Miami in a non-school context. Since the city was also under a self-imposed duty to ensure nondiscriminatory policies by its lessees, the issue of whether *inaction* is sufficient in itself to engender state action was clearly posited. The Fifth Circuit had earlier answered the question in the affirmative. In Jennings v. Patterson, 488 F.2d 436 (5th Cir. 1974), whites erected a barricade precluding blacks' access to the street. The city refused to remove it. Reviewing the legislative history of § 1983, Judge Roney concluded:

> "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of [rights guaranteed] might be denied by the state agencies." . . . Accordingly, we hold that the failure of the City and its governing officials to dismantle the fence constitutes state action proscribed by Section 1983.

Id. at 441 (citations omitted).

3. Conspiratorial Activities

Finally, state action will be found where the government's involvement in private conduct takes the form of an agreement to engage in a joint activity, the result of which is a deprivation of federal rights.[255] In *Adickes v. S.H. Kress & Co.*,[256] the plaintiff was arrested after attempting to obtain service at the defendant's restaurant. The complaint alleged a conspiracy between the restaurant and the city police department to violate the rights of whites who sought service while accompanied by blacks.[257] Concluding that the state action nexus had been satisfied, the Court stated:

> [A] private party involved in . . . conspiracy, even though not an official of the State, can be liable under § 1983. "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. . . . It is enough that he is a willful participant in joint activity with the State or its agents."[258]

Unlike the Fifth Circuit's restriction of state action in the *Burton* context, its application of the *Adickes* doctrine has not been affected by the race/non-race dichotomy. Its current posture is reflected by *Smith v. Brookshire Brothers, Inc.*,[259] where two customers instituted a section 1983 suit after being detained as suspected shoplifters. Citing *Adickes*, the court found state action on the basis that the police department had detained the plaintiffs pursuant to a preconceived plan to answer calls by store employees and take customers into custody without either a valid complaint or probable cause.[260]

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[255] Although conspiratorial conduct by itself is insufficient to create a § 1983 cause of action, it "may be charged as the legal mechanism through which to impose liability on each and all of the Defendants without regard to the person doing the particular act." Nesmith v. Alford, 318 F.2d 110, 126 (5th Cir. 1963), *cert. denied*, 375 U.S. 975 (1964); *accord*, Mizell v. North Broward Hosp. Dist., 427 F.2d 468, 472-73 (5th Cir. 1970).

[256] 398 U.S. 144 (1970).

[257] *Id.* at 150 n.5.

[258] *Id.* at 152, *quoting* United States v. Price, 383 U.S. 787, 794 (1966).

[259] 519 F.2d 93 (5th Cir. 1975) (per curiam), *cert. denied*, 424 U.S. 915 (1976).

[260] Judge Gee disagreed, contending that the only preconceived plan was "that when a merchant caught a shoplifter (or thought he had), he would call the police to come out rather than taking him down to the station himself." 519 F.2d at 98 (Gee, J., dissenting).

While the circuit has drawn the line to exclude "unwitting acquiescence or response" as distinguished from "concerted action," Dreyer v. Jalet, 349 F. Supp. 452, 464 (S.D. Tex. 1972), *aff'd per curiam*, 479 F.2d 1044 (5th Cir. 1973), the holding in *Smith* reflects the basic approach of the court. In Fulton v. Emerson Elec. Co., 420 F.2d 527 (5th Cir. 1969) (per curiam), *cert. denied*, 398 U.S. 903 (1970), a suit for damages against county officials, the named company and numerous private individuals alleged a conspiracy to violate union organizers' first amendment rights. The court found that the complaint adequately

IV. THE BASIC DAMAGE CLAIM[261]

A. *Establishing a Cause of Action*

In *Monroe,* the Court initiated the development of a body of law

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alleged "concerted action" to state a cause of action. *See also* Poirier v. Carson, 537 F.2d 823, 825 (5th Cir. 1976) (newspaper reporter and state employees; insufficient showing of relationship or preconceived plan); Taylor v. Gibson, 529 F.2d 709, 715-16 (5th Cir. 1976) (private physicians and sheriff); Tosh v. Buddies Supermarkets, Inc., 482 F.2d 329, 331 (5th Cir. 1973) (relationship between store management and police department insufficiently shown); Gomez v. Florida State Employment Serv., 417 F.2d 569, 578-79 (5th Cir. 1969) (farmers and state officials). *Compare* note 189 *supra* (detailing denial of § 1983 actions against federal officials) *with* Jones v. Bales, 58 F.R.D. 453, 458 (N.D. Ga. 1972) (cause of action against federal officers acting in concert with state officials), *aff'd per curiam,* 480 F.2d 805 (5th Cir. 1973).

The conspiracy approach is a knife that cuts both ways. Specifically, allegations against private persons acting in concert with state officials who have immunity, see section II. *B. supra,* defeat a suit at its inception:

> [A] private person alleged to have conspired with a state judge and attorney . . . cannot be held liable, since he is not conspiring with persons acting under color of law against whom a valid claim could be stated.

Hill v. McClellan, 490 F.2d 859, 860 (5th Cir. 1974) (per curiam); *accord,* Guedry v. Ford, 431 F.2d 660 (5th Cir. 1970) (per curiam).

[261] Any attempt to detail the full panoply of actions available under § 1983 would be futile. Justice Stone's analysis in Hague v. CIO, 307 U.S. 496, 525-32 (1939) (separate opinion of Stone, J.), as expanded in Lynch v. Household Fin. Corp., 405 U.S. 538, 543 & n.7 (1972) (no distinction between deprivations of personal and property rights), has resulted in a non-exclusive listing including

> nearly every right that has been brought within . . . the fourteenth amendment . . . . These rights include the following: freedom of speech; freedom of assembly; freedom of religion; the right of privacy; freedom from racial discrimination in labor, education, housing, public accomodations, and voting; freedom from economic discrimination; the right to bear arms; freedom from unreasonable searches and seizures; the right to vote and engage in the political process; the right to due process in criminal investigation, indictment, trial, and appeal; and the right to equality in legislative and congressional apportionment.

Niles, *Civil Actions For Damages Under The Federal Civil Rights Statutes,* 45 TEX. L. REV. 1015, 1021 (1967) (footnotes omitted).

Also significant is the fact that § 1983 authorizes suits for violations of the "Constitution *and laws*" of the United States. Previously discussed, see note 23 *supra,* is the discrepancy between § 1983 and § 1343(3) with respect to the latter's inclusion of the term laws "providing for equal rights of citizens" as a jurisdictional prerequisite and the Supreme Court's conclusion that for purposes of constitutional claims no distinctions are to be drawn between the two. Lynch v. Household Fin. Corp., 405 U.S. 538, 543 & n.7 (1972). On the other hand, where the Court has been faced with only a claimed *statutory* violation, it has specifically reserved decision on the issue of whether § 1343(3) jurisdiction is limited solely to laws which provide for equal rights. Hagans v. Lavine, 415 U.S. 528, 534 n.5 (1974); Rosado v. Wyman, 397 U.S. 397, 405 n.7 (1970); King v. Smith, 392 U.S. 309, 312 n.3 (1968).

In the Fifth Circuit, an alternative jurisdictional basis for § 1983 claims arising under federal statutory rights is provided by 28 U.S.C. § 1343(4) (1970), which establishes directed toward the issue of potential liability in section 1983 damage actions[262] by requiring that the statute be "read against the background

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jurisdiction over conduct actionable "under any Act of Congress providing for the protection of civil rights." Houston Welfare Rights Organization, Inc. v. Vowell, 555 F.2d 1219, 1220 n.1 (5th Cir. 1977); Gomez v. Florida State Employment Serv., 417 F.2d 569, 580 n.39 (5th Cir. 1969). *See also* Blue v. Craig, 505 F.2d 830 (4th Cir. 1974) (extensive opinion on alternative means of generating jurisdiction through § 1343(3) & (4)). The question has created substantial conflict among the circuits, *e.g.*, Andrews v. Maher, 525 F.2d 113, 119-20 (2d Cir. 1975) (rejecting *Gomez and Blue*); Randall v. Goldmark, 495 F.2d 356, 359-60 (1st Cir.) (per curiam) (rejecting *Gomez*'s "broad interpretation" of § 1343(4)), *cert. denied*, 419 U.S. 879 (1974), as well as exciting a great deal of scholarly comment. *E.g.*, Herzer, *supra* note 21; Note, *Federal Jurisdiction Over Challenges to State Welfare Programs*, 72 COLUM. L. REV. 1404, 1421-28 (1972). A final alternative method of establishing jurisdiction over a § 1983 statutory violation is to append the statutory claim to a substantial constitutional claim. Hagans v. Lavine, 415 U.S. 528, 536 (1974).

[262] In seeking personal damage liability, relief is requested in the defendant's personal capacity even though, for purposes of "state action," the acts causing the constitutional deprivation must be alleged to have occurred in his official capacity. *See Ex parte* Young, 209 U.S. 123, 159-60 (1908), *quoted with approval in* Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974) (approving the concept of personal damage liability against governor in his individual capacity).

Defenses other than those discussed in this section include:

(a) *Improper venue.* A § 1983 suit is governed by the venue provisions of 28 U.S.C. § 1391(b) (1970), providing that suit be brought "in the judicial district where all defendants reside, or in which the claim arose," and 28 U.S.C. § 1392 (1970), allowing defendants who reside in different districts in the same state to be sued "in any such district." *See also* 28 U.S.C. § 1393 (1970) (dealing with different divisions within the same judicial district). While the circuit has interpreted a state officer's place of business as his "official residence," Trueman Fertilizer Co. v. Larson, 196 F.2d 910, 911 (5th Cir. 1952), a recent three-judge court opinion concludes that venue is proper in the judicial district of the defendant's private residence. Following the *Ex parte Young* fiction:

> [O]nce an individual defendant has been alleged to have violated the law . . . he transcends his capacity as an officer of the state and is transformed into an ordinary citizen residing in his ordinary residence. . . . [T]he government official allegedly acting outside the scope of his public capacity should not enjoy the benefit of defending on his own turf those unlawful wrongs which are committed against the public he is to serve.

Sheffield v. Texas, 411 F. Supp. 709, 713 (N.D. Tex. 1976) (per curiam) (citation omitted); *accord,* Smith v. Merrill, 81 F.2d 609, 613 (5th Cir. 1936). *See also* Jones v. Bales, 58 F.R.D. 453 (N.D. Ga. 1972) (discussion of proper venue when conspiratorial activity is alleged), *aff'd per curiam,* 480 F.2d 805 (5th Cir. 1973).

(b) *Failure to state a claim upon which relief can be granted.* A complaint is not subject to dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). This standard is clearly hostile to summary dismissals and parallels the Court's test for determining whether a sufficiently "substantial" federal question has been alleged to invoke jurisdiction. Specifically, a complaint is properly filed unless it is "so patently without merit as to justify . . . the court's dismissal for want of jurisdiction," Bell v. Hood, 327 U.S. 678, 683 (1946), or "so insubstantial, implausible, foreclosed by prior decisions . . . or otherwise completely devoid of merit as not to involve a federal controversy." Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666-67 (1974). Presuming the claim potentially falls below minimal requirements:

> Jurisdiction . . . is not defeated . . . *by the possibility* that the averments might fail to state a cause of action . . . . For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.

Bell v. Hood, 327 U.S. 678, 682 (1946) (emphasis added).

(c) *Failure to exhaust administrative and judicial remedies.* The short, conclusory statement in *Monroe* that a § 1983 cause of action is supplementary to *any* relief provided by the state, 365 U.S. at 183, reflects a conscious decision by the Reconstruction Congress to reject several other available options, including: (1) limiting the legislation's applicability to the secessionist states, *cf.* Voting Rights Act of 1965, § 4, 42 U.S.C. § 1973b (1970) (restricting that act's geographic coverage); (2) conditioning federal jurisdiction on a showing that federal rights could not be protected by the state, *e.g.*, as incorporated into 42 U.S.C. § 1443 (1970) (removal of civil rights cases); or (3) giving lower federal courts original jurisdiction to review state decisions, *cf.* 28 U.S.C. § 2254 (1970) (federal habeas corpus). The rejection of these alternatives and the acceptance of the federal courts rather than those of the states as the primary guarantors of constitutional rights, *see generally* H. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 230 (1948); B. Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U.L. REV. 740 (1974), has led to a clear and unwaivering line of decisions consistent with the principle first established in *Monroe*, rendering § 1983 a unique exception to the normal exhaustion requirement. McNeese v. Board of Educ., 373 U.S. 668 (1963), emphasizes that the congressional purpose of § 1983 was "to provide a remedy in the federal courts supplementary to any remedy [whether adequate or not] any State might have." *Id.* at 672, *citing* Monroe v. Pape, 365 U.S. 167, 180-83 (1961); *accord*, Ellis v. Dyson, 421 U.S. 426, 432 (1975) (§ 1983 is free from the requirement of exhaustion of state judicial or administrative remedies); Gibson v. Berryhill, 411 U.S. 564, 574-75 (1973) ("administrative remedies need not be exhausted"); Preiser v. Rodriguez, 411 U.S. 475, 477 (1973) (state prisoner not required to first seek redress in state forum where federal remedy is available); Carter v. Stanton, 405 U.S. 669, 671 (1972) (exhaustion of administrative remedies not required); Wilwording v. Swenson, 404 U.S. 249, 250 (1971) (per curiam) (state prisoners not required to file "repetitious applications" in state court); Houghton v. Shafer, 392 U.S. 639, 640 (1968) (per curiam) ("resort to [administrative] remedies is unnecessary"); Damico v. California, 389 U.S. 416, 417 (per curiam) (welfare claimants need not exhaust administrative remedies). As noted in Steffel v. Thompson, 415 U.S. 452 (1974):

> When federal claims are premised on . . . § 1983 . . . we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights.

Id. at 472-73 (citations omitted). *See also* Burrell v. McCray, 426 U.S. 471 (1976) (per curiam) (certiorari improvidently granted on the issue of whether administrative remedies created by a prison need be exhausted prior to filing a § 1983 suit). *But cf.* Huffman v. Pursue, Ltd., 420 U.S. 592, 609 n.21 (1975) (disclaiming any undermining of *Monroe* in requiring exhaustion of state appellate remedies prior to seeking federal injunctive relief).

The Fifth Circuit is in agreement. *E.g.*, Leonard v. City of Columbus, 551 F.2d 974 (5th Cir. 1977) (dismissed policemen need not pursue state remedies), *rehearing en banc granted*, No. 75-2344 (5th Cir. July 1, 1977); Wells Fargo Armored Serv. Corp. v. Georgia Pub. Serv. Comm'n, 547 F.2d 938, 939 n.1 (5th Cir. 1977) (corporation need not exhaust administrative remedies); Hardwick v. Ault, 517 F.2d 295, 297 (5th Cir. 1975) (state prisoners need not exhaust "adequate" administrative remedies); Beale v. Blount, 461 F.2d 1133, 1139 n.11 (5th Cir. 1972) (§ 1983 does not require exhaustion of administrative remedies); Sparks v. Griffin, 460 F.2d 433, 442 (5th Cir. 1972) (teacher need not exhaust local administrative remedies); Hobbs v. Thompson, 448 F.2d 456, 462 (5th Cir. 1971) (firemen need not exhaust state judicial remedies); Moreno v. Henckel, 431 F.2d 1299, 1304 (5th Cir. 1970) (discharged civil service security guard need not pursue state remedies); Jones v. Decker, 436 F.2d 954, 955 (5th Cir. 1970) (per curiam) (inmate need not exhaust "available" state remedies); Hall v. Garson, 430 F.2d 430, 436 (5th Cir. 1970) (tenant need not exhaust state remedies against landlord's peremptory seizure of property). *But compare* Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970) (recommending due process procedures applicable to school situations) *with* Stapp v. Avoyelles Parish School Bd., 545 F.2d 527, 531 n.7 (5th Cir. 1977) (indicating that issue of exhaustion of administrative remedies for teachers may still be an open question). *See also* Bland v. McHann, 463 F.2d 21, 24 (5th Cir. 1972) (Tax Injunction Act, 28 U.S.C. § 1341 (1970), mandates exhaustion of state remedies in § 1983 cases involving exercise of taxing power). The circuit has also warned that

> [o]n the assumption that we might require exhaustion of *administrative* remedies as a prerequisite to maintaining a § 1983 action in federal court . . . we have required [only] "such prior reference to local *institutional* authorities as may be necessary to assure that the action complained of is final *within the institution* in the sense that it is ripe for adjudication."

Polk v. State Bar of Tex., 480 F.2d 998, 1003 (5th Cir. 1973), *quoting* Stevenson v. Board of Educ., 426 F.2d 1154, 1157 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970).

For a general review of exhaustion requirements outside the circuit, see Gonzales v. Shanker, 533 F.2d 832, 834 (2d Cir. 1976) (listing exceptions in that circuit to the rule of no exhaustion); McCray v. Burrell, 516 F.2d 357, 361-65 (4th Cir. 1975) (en banc) (detailed opinion on the issue in the specific context of prison administration), *cert. dismissed*, 426 U.S. 471 (1976).

(d) *Running of the statute of limitations.* Section 1983 is silent regarding the time frame within which a cause of action remains viable. But because 42 U.S.C. § 1988 (1970) (amended 1976), see subsection (e) *infra*, authorizes incorporation of state law under circumstances where civil rights statutes "are deficient in the provisions necessary to furnish suitable remedies," state statutes of limitations are now uniformly regarded as binding on a § 1983 claim, *e.g.*, Kissinger v. Foti, 544 F.2d 1257, 1258 (5th Cir. 1977) (per curiam); Shaw v. McCorkle, 537 F.2d 1289, 1291 (5th Cir. 1976); Powell v. Radkins, 506 F.2d 763, 765 (5th Cir.), *cert. denied*, 423 U.S. 873 (1975); McGuire v. Baker, 421 F.2d 895, 898 (5th Cir.), *cert. denied*, 400 U.S. 820 (1970); Beard v. Stephens, 372 F.2d 685, 688 (5th Cir. 1967), unless the period is so unreasonably short as to impinge on the federal policy underlying § 1983. Franklin v. City of Marks, 439 F.2d 665, 669 (5th Cir. 1971) (10-day limitation period for contesting annexations held unreasonable). The circuit's most definitive analysis on this subject divides the pertinent cases into two classifications: (1) those determining the "essential nature" of the federal claim and then applying the limitation period which would be applicable to a state claim of the same general category; and (2) those determining the limitation on the basis of "how a state court applying state law would categorize the action for relief." Ingram v. Steven Robert Corp., 547 F.2d 1260, 1261 (5th Cir. 1977). Comparing the binding effect of state law, through § 1988, to other areas, see subsection (e) *infra*, Judge Goldberg commented on the anamolous carte blanche acceptance of state limitations:

> It borders on the solecistic to legislate a federal cause of action cognizable in federal courts, but migrate to the states for a time limitation based on state law. Not only might the variations in limitations provisions among the states

> encourage forum shopping, but the stricture that federal courts choose among various state statutes engenders the confusion that often results when a federal court wanders about in alien state territory. Most important, of course, the uncertainty about which limitations provision applies affords inadequate notice to potential plaintiffs. Were we in the beginning, we might for the sake of uniformity argue for a federal common law limitation.

547 F.2d at 1263.

The circuit has also concluded that a choice to pursue available state administrative or judicial remedies tolls the statute of limitations for any subsequent § 1983 cause of action.

> We think that it is clearly within the underlying purpose of the Civil Rights Acts to encourage utilization of state administrative and court procedures to vindicate alleged wrongs under a state-created cause of action before requiring a plaintiff to bring his federal suit to prevent his being barred by a state statute of limitations. Thus, although the federal courts apply a state limitations statute in suits to vindicate a federal right, they look to the federal purpose, policy and intent of Congress as to the objectives of the legislation in determining whether the pursuit of state remedies tolls the statute.

Mizell v. North Broward Hosp. Dist., 427 F.2d 468, 474 (5th Cir. 1970); *accord*, Guerra v. Manchester Terminal Corp., 498 F.2d 641, 649 n.13 (5th Cir. 1974). *But cf.* Meadows v. Evans, 529 F.2d 385, 386 (5th Cir. 1976), *aff'd en banc*, 550 F.2d 345, 345 (5th Cir. 1977) (per curiam) (remand to determine whether case should be held in abeyance on district court docket in order to toll statute of limitations pending state court proceedings); Fulford v. Klein, 529 F.2d 377, 382 (5th Cir. 1976) (same), *aff'd en banc*, 550 F.2d 342 (5th Cir. 1977). For a Second Circuit case rejecting the Fifth Circuit's approach, see Meyer v. Frank, 550 F.2d 726, 729 (2d Cir. 1977), *petition for cert. filed*, 45 U.S.L.W. 3808 (U.S. June 14, 1977) (No. 76-1736). Potential res judicata and collateral estoppel problems created by an initial filing in state court are discussed in subsection (f) *infra*.

(e) *State law limitations on causes of action and available relief.* Section 1988 supplements the civil rights statutes and provides:

> The jurisdiction in civil . . . matters . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .

42 U.S.C. § 1988 (amended 1976). Although state law is not binding if "inconsistent" with full implementation of "the Constitution and laws [including § 1983] of the United States," by its literal language the statute directs federal courts to look to state law to provide relief where § 1983 is deficient. *Compare* Brazier v. Cherry, 293 F.2d 401 (5th Cir.) (holding that state wrongful death statute authorized a § 1983 suit by decedent's representative), *cert. denied*, 368 U.S. 921 (1961) *with* Shaw v. Garrison, 545 F.2d 980, 985 (5th Cir. 1977) (federal common law allows survival action where where state law would have prohibited it).

With respect to state law and damage relief, the Supreme Court has stated:

> The existence of a statutory right implies the existence of all necessary and appropriate remedies [and § 1988] means . . . that both federal and state rules on damages may be utilized, whichever better serves the policies expressed . . . . The rule of damages, whether drawn from federal or state sources, *is a federal rule* responsive to the need whenever a federal right is impaired.

Sullivan v. Little Hunting Park, 396 U.S. 229, 239-40 (1969) (emphasis added). In Wood v. Strickland, 420 U.S. 308 (1975), the Court set the standard for compensatory damages:

> A compensatory award will be appropriate only if the [defendant] has acted with such an impermissible motivation or with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

Id. at 322; *accord,* Kellerman v. Askew, 541 F.2d 1089, 1091 n.4 (5th Cir. 1976) (per curiam). In contrast, punitive damages are allowed only where "the act or omission of the Defendant . . . which proximately caused injury to the Plaintiff was maliciously or wantonly or oppressively done." O'Connor v. Donaldson, 422 U.S. 563, 572 n.7 (1975); *accord,* Adickes v. S.H. Kress & Co., 398 U.S. 144, 232-33 (1970) (Brennan, J., concurring) (compensatory damages on showing of § 1983 violation; punitive damages if "willful"); Lee v. Southern Home Sites Corp., 429 F.2d 290, 294 (5th Cir. 1970) (acts in willful and gross disregard give rise to punitive damages); Roberts v. Pierce, 398 F.2d 954, 956-57 (5th Cir. 1968) (same).

Finally, the Fifth Circuit advocates a uniform application of damage rules:

> "We believe that the benefits of the [Civil Rights] Acts were intended to be uniform throughout the United States, that the protection to the individual to be afforded by them was not intended by Congress to differ from state to state, and that the amount of damages to be recovered by the injured individual was not to vary because of the law of the state in which the federal court suit was brought. Federal common law must be applied to effectuate uniformity."

Shaw v. Garrison, 545 F.2d 980, 985 (5th Cir. 1977), *quoting* Basista v. Weir, 340 F.2d 74, 86 (3d Cir. 1965). *But see* Jones v. Hildebrant, 550 P.2d 339, 343-44 (Colo. 1976) (en banc) (issue of controlling effect of state law of damages in § 1983 action brought in state court), *petition for cert. dismissed as improvidently granted,* 45 U.S.L.W. 4703 (U.S. June 14, 1977) (No. 76-5416) (per curiam).

(f) *Res judicata and collateral estoppel.* (1) Prior civil case in state court. Consistent with unobtrusive dictum by the Supreme Court, *e.g.*, Huffman v. Pursue, Ltd., 420 U.S. 592, 606 n.18 (1975) ("normal rules of res judicata and . . . estoppel operate to bar relitigation under . . . § 1983"), initiating civil litigation in the state court system invites application of the doctrines of res judicata and collateral estoppel by judgment to a subsequent federal suit arising from the same subject matter as the state court suit. *See* Cornwell v. Ferguson, 545 F.2d 1022, 1026 (5th Cir. 1977) (prior state court judgment res judicata against subsequent § 1983 claim); Jennings v. Caddo Parish School Bd., 531 F.2d 1331, 1332 (5th Cir.) (per curiam) (prior state court judgment conclusive as to all matters that were or might have been litigated; subsequent § 1983 suit barred by res judicata), *cert. denied*, 429 U.S. 897 (1976); Cheramie v. Tucker, 493 F.2d 586, 589 n.10 (5th Cir.) (concluding that the Fifth Circuit has embraced the "modern" view of collateral estoppel and moved toward repudiating the doctrine of mutuality of estoppel), *cert. denied,* 419 U.S. 868 (1974); Garner v. Louisiana State Bd., 489 F.2d 91, 91 (5th Cir.) (per curiam) (res judicata applied to § 1983 suit after unsuccessful litigation in state court), *cert. denied,* 419 U.S. 830 (1974); Parker v. McKeithen, 488 F.2d 553, 557-58 (5th Cir.) (collateral estoppel applied; negligence issue litigated in state court), *cert. denied,* 419 U.S. 838 (1974); Frazier v. East Baton Rouge Parish School Bd., 363 F.2d 861, 862 (5th Cir. 1966) (per curiam) (res judicata applies to all matters that were "or might have been litigated in the first action").

A litigant can, of course, employ the concept of pendent jurisdiction to join state claims with a § 1983 cause of action if they meet the "common nucleus of operative fact" requirement of United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). *E.g.*, Brown v. Knox, 547 F.2d 900, 902-03 (5th Cir.) (district court improperly dismissed plaintiff's state tort action since that action and the § 1983 claim arose from a "common nucleus of operative fact"), *cert. denied*, 45 U.S.L.W. 3819 (U.S. June 21, 1977) (No. 76-1473). *But cf.* Aldinger v. Howard, 427 U.S. 1, 5 (1976) (prohibiting joinder of causes of actions against "pendent parties" who are "nonpersons"). It now seems clear that § 1983 claims may be joined with state claims and filed in state court. *Id.* at 15-18, 36 n.17. See note 17 *supra.* But if a pragmatic choice dictates an initial filing in state court solely on the state claim, the only procedure available to preserve access to the federal system is that approved for use in abstention cases by England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964), *i.e.* a specific reservation of the federal claim in the state court proceedings. *See* Cornwell v. Ferguson, 545 F.2d 1022, 1026 (5th Cir. 1977) (constitutional claims may be reserved for subsequent litigation in federal court by making a clear reservation on the state record); Jennings v. Caddo Parish School Bd., 531 F.2d 1331, 1332 (5th Cir.) (per curiam) (same), *cert. denied*, 429 U.S. 897 (1976). This procedure is also available to those who become involuntary defendants in a state court suit. *Compare* Brown v. Chastain, 416 F.2d 1012, 1013-14 (5th Cir. 1969) (involuntary defendant's submission of a federal question in state court civil case precludes subsequent § 1983 suit in federal court), *cert. denied*, 397 U.S. 951 (1970) *with* Billingsley v. Seibels, 556 F.2d 276, 277 (5th Cir. 1977) (per curiam) (use of *England* certification by involuntary defendant offers subsequent access to federal court via § 1983).

Although judgments by a state administrative tribunal concerning possible § 1983 claims do not carry the same potential for res judicata, findings of fact do have significant consequences.

> [S]uch findings, when reached by correct procedures and supported by substantial evidence, are entitled to great weight, and the court should never lightly substitute its judgment for that of the board.

Ferguson v. Thomas, 430 F.2d 852, 859 (5th Cir. 1970). *See also* Leonard v. City of Columbus, 551 F.2d 974, 977 (5th Cir.) (implicit rejection of lower court holding applying res judicata to previous administrative hearing), *rehearing en banc granted*, No. 75-2344 (5th Cir. July 1, 1977); *accord*, Wood v. Strickland, 420 U.S. 308, 326 (1975) ("But § 1983 does not exend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations."); *cf.* Mack v. Florida State Bd. of Dentistry, 430 F.2d 862, 863-64 (5th Cir. 1970) (res judicata not afforded to state administrative determination affirmed by state court where the administrative hearing was merely an "ungoverned confrontation"). *See generally* Averitt, *Federal Section 1983 Actions After State Court Judgments*, 44 U. Colo. L. Rev. 191 (1972); Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 Nw. U.L. Rev. 859 (1976); *Developments in the Law—Res Judicata*, 65 Harv. L. Rev. 818 (1952).

(2) Prior criminal case. Section 1983 violations arising out of criminal litigation are subject to the defense of collateral estoppel if "a fact decided in an earlier [criminal] suit is conclusively established between [the] parties and their privies, provided it was necessary to the result in the first suit." Brazzel v. Adams, 493 F.2d 489, 490 (5th Cir. 1974), *quoting* Tomlinson v. Lefkowitz, 334 F.2d 262, 264 (5th Cir. 1964). Thus, where an individual contests the validity of his arrest by a § 1983 damage suit, "so long as the . . . conviction stands, the arrest must be viewed as proper." Shank v. Spruill, 406 F.2d 756, 757 (5th Cir. 1969) (per curiam); *accord*, Brazzell v. Adams, 493 F.2d 489, 490 (5th Cir. 1974) (guilty plea admits legality of contested arrest; § 1983 damage suit barred by collateral estoppel); Alexander v. Emerson, 489 F.2d 285, 286 (5th Cir. 1973) (per curiam) (habeas corpus is the only remedy in a suit contesting arrest and search leading to conviction). *But cf.* Covington v. Cole, 528 F.2d 1365, 1370 (5th Cir. 1976) (§ 1983 damage action allowed to attack validity of search *unrelated* to conviction); Jones v. Bales, 58 F.R.D. 453, 460 (N.D. Ga. 1972) (same), *aff'd per curiam*, 480 F.2d 805 (5th Cir. 1973). *Compare* Ford v. Byrd, 544 F.2d 194, 195 (5th Cir. 1976) (per curiam) (pretermitting issue of collateral estoppel in § 1983 case seeking damages as a result of an allegedly invalid search leading to a conviction) *with* Stone v. Powell, 428 U.S. 465, 494-95 (1976) (habeas corpus relief no longer available to contest fourth amendment issues), *noted in* 48 Miss. L.J. 155 (1977).

(g) *The Habeas Corpus-§ 1983 Interplay.* In Preiser v. Rodriguez, 411 U.S. 475 (1973), inmates sought injunctive relief against prison administrators alleging unconstitutional deprivations of credit for good time served. The Court held that available state remedies must be exhausted prior to bringing a § 1983 action where the relief sought falls within the traditional boundaries of habeas corpus, *i.e.* challenging the "fact or duration" of the confinement. *Id.* at 489. Distinguished, however, were damage claims which do not attack the confinement or seek release. *Id.* at 494.

The Court amplified the *Preiser* holding in Wolff v. McDonnell, 418 U.S. 539 (1974), a § 1983 suit claiming, *inter alia*, that prison disciplinary proceedings violated due process. The requested relief included: (1) restoration of good time; (2) development of new procedures complying with due process; and (3) damages for past use of allegedly unconstitutional procedures. *Id.* at 553. After an initial determination that *Preiser* foreclosed restoration of good time credits, the Court distinguished *Wolff*:

> But the complaint [in *Wolff*] also sought *damages*; and *Preiser* expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings . . . . Respondent's damages claim was therefore properly before the District Court.

Id. at 554 (footnote and citation omitted) (emphasis added). In a footnote to that statement, however, the Court added, "One would anticipate that normal principles of res judicata would apply in such circumstances." *Id.* at 554 n.12.

The Fifth Circuit has developed an extensive set of principles to be considered when the subject matter of a § 1983 damage action raises the issue of whether habeas or another remedy is available. First, in accord with *Preiser*, § 1983 damage suits *not* directed to "the fact or duration" of confinement are maintainable without reference to prior habeas litigation. Watson v. Briscoe, 554 F.2d 650, 652 (5th Cir. 1977) (per curiam) (§ 1983 suit alleging "negligence" by prison medical staff); Bruce v. Wade, 537 F.2d 850, 851 (5th Cir. 1976) (allegations of physical abuse while incarcerated); Qualls v. Shaw, 535 F.2d 318, 319 (5th Cir. 1976) (per curiam) (*Preiser* inapplicable in damage suit against clerk for failure to supply jury records; no challenge to conviction involved); Williams v. McCall, 531 F.2d 1247, 1247-48 (5th Cir. 1976) (per curiam) (claim against pardon board contesting procedures employed proper); Fontaine v. Walls, 515 F.2d 884, 884-85 (5th Cir. 1975) (per curiam) (damage suit alleging mistreatment during pretrial confinement). Second, pursuant to normal rules of res judicata, § 1983 suits challenging the plaintiff's conviction, and therefore confinement, are precluded. Grundstrom v. Darnell, 531 F.2d 272, 273 (5th Cir. 1976) (per curiam) (demanding right to "examining trial" and attacking adequacy of trial counsel). See subsection f(2) *supra*. Third, § 1983 damage suits contesting the constitutionality of a criminal conviction cannot be brought while the case is on appeal or before all state remedies have been exhausted. Fulford v. Kline, 529 F.2d 377, 378 (5th Cir. 1976) ("habeas corpus is the exclusive initial cause of action where the basis for the [§ 1983] claim goes to the constitutionality of the state court conviction"), *aff'd en banc*, 550 F.2d 342 (5th Cir. 1977) (per curiam); Meadows v. Evans, 529 F.2d 385, 386 (5th Cir. 1976) (guilty plea claimed to have been illegally obtained), *aff'd en banc*, 550 F.2d 345 (5th Cir. 1977) (per curiam); *accord*, Huffman v. Pursue, Ltd., 420 U.S. 592, 609 (1975) (requiring exhaustion of state appellate remedies prior to filing § 1983 suit seeking *injunctive relief*). If the conviction is not overturned on appeal or after exhausting collateral remedies, traditional principles of res judicata or collateral estoppel will presumably apply. Meadows v. Evans, 550 F.2d 345, 345-53 (5th Cir. 1977) (en banc) (per curiam) (concurring and dissenting opinions). Fourth, when habeas corpus is not available, *Preiser* is not a defense to a § 1983 damage claim. Conner v. Pickett, 552 F.2d 585, 587 (5th Cir. 1977) (per curiam) (determination that plaintiff was not "in custody" is sufficient to present § 1983 claim arising from his conviction). See subsection f(2) *supra*.

of tort liability that makes a man responsible for the natural consequences of his actions."[263] Subsequently, in *Pierson v. Ray,*[264] the first step was taken to develop what is referred to as the "*Monroe* standard."

Pierson[265] involved a police arrest pursuant to a breach of the peace statute subsequently declared unconstitutional in an unrelated case.[266] Holding that police officers are "not charged with predicting the future course of constitutional law,"[267] the Court defined the scope of immunity in terms of defenses available to law enforcement officers at common law:

> Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved.[[268]]
>
> . . . .
>
> [Thus] the defense of good faith and probable cause,[[269]] which [is] available to [police] officers in [a] common law action for false arrest

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(h) *Standing and abstention.* These topics will be discussed in the second installment of this article.

[263] Monroe v. Pape, 365 U.S. 167, 187 (1961). By adopting tort liability as the touchstone, the Court necessarily excluded a requirement of specific intent to deprive a person of a federal right. *Id.* The standard proved so opaque, however, that conflicting interpretations became the order of the day. *Compare* Striker v. Pancher, 317 F.2d 780, 784 (6th Cir. 1963) (conduct must be "reprehensible" for § 1983 liability) *and* Raab v. Patacchia, 232 F. Supp. 71, 74 (S.D. Cal. 1964) ("callous and shocking" standard) *with* Pierson v. Ray, 352 F.2d 213, 218 (5th Cir. 1965) (no defenses), *aff'd in part, rev'd in part*, 386 U.S. 547 (1967).

[264] 386 U.S. 547 (1967).

[265] The case arose from a decision by the Fifth Circuit accepting the *Monroe* precedent at face value, *i.e.* no defenses were available in a § 1983 damage claim subsequent to a showing of causation between the defendant's act and the resulting constitutional tort. 352 F.2d at 218.

[266] Thomas v. Mississippi, 380 U.S. 524 (1965).

[267] 386 U.S. 547, 557 (1967). No liability can be imposed "for acting under a statute . . . reasonably believed to be valid but . . . later held unconstitutional on its face." *Id.* at 555.

[268] *Id.*

[269] *Id.* at 557. The phrase "probable cause" was used without the benefit of substantive definition. Because it is a generic term, however, the omission presents little problem. *See, e.g.*, Draper v. United States, 358 U.S. 307, 313 (1959) ("probable cause" is determined by the reasonable man standard). For purposes of defining good faith, one is left with the operative facts of *Pierson.* An integrated group of clergymen was arrested after entering the "white only" waiting room of a segregated bus depot. The Court remanded for a determination of whether the ministers were arrested pursuant to "good faith reliance on the statute." Good faith, in turn, was to be determined by an inquiry into the arresting officers' subjective intent, *i.e.*, whether they meant to curtail a breach of the peace or simply used the statute as a pretense to remove the plaintiffs from a segregated waiting room. A clearer example of this distinction would be a police officer's attempt to curtail a peaceful demonstration by using a seldom, if ever, enforced jaywalking statute to arrest leaders of the group. In this situation, probable cause presumably would be found, but not good faith.

> and imprisonment, is also available to them in [an] action under § 1983.[270]

Having defined section 1983 defenses in the context of a tort-common law interlock, a series of decisions ensued emasculating the *Monroe-Pierson* approach.[271]

Scheuer v. Rhodes[272] explored the defenses available to the Governor of Ohio in a suit alleging that he had "intentionally, recklessly, willfully and wantonly"[273] called out the National Guard during the Kent State riots. Reversing a Sixth Circuit opinion which based its refusal to impose liability on common law defenses,[274] the Court reviewed the *Pierson* "good faith and probable cause" standard without reference to the common law.[275] After giving due consideration to the "scope of discretion and responsibilities of the [Governor's] office,"[276] the court continued:

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[270] 386 U.S. at 557. For an overall analysis of police liability at common law, see Mathes & Jones, *supra* note 55, at 894-99.

[271] Not surprisingly, the Court's retrenchment came in a suit against a governor where the common law offers nothing but escape hatches. See note 98 *supra*. *See also* Horlbeck & Harkness, *Executive Immunity and the Constitutional Tort*, 51 DEN. L.J. 321, 324-26 (1974). Indeed, the practical consequences of unloading the full arsenal of common law defenses on § 1983 actions had earlier been noted by Mr. Justice Frankfurter. While opposing the state action concept recognized in *Monroe*, he concluded:

> If, for example, petitioners had sought damages in the state courts of Illinois and if those courts had refused redress on the ground that the official character of the respondents clothed them with civil immunity, we would be faced with the sort of situation to which the language in the Wolf opinion was addressed: "we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

Monroe v. Pape, 365 U.S. 167, 211 (1961) (Frankfurter, J., dissenting), *quoting* Wolf v. Colorado, 338 U.S. 25, 28 (1949); *accord*, Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 287 (1913) (in cases involving fourteenth amendment rights, "whether the state has authorized the wrong is irrelevant"). The Fifth Circuit reflects a similar philosophy, noting that if "'all state officials in suits brought under § 1983 enjoy an immunity similar to that they might enjoy in suits under state law,' . . . such a holding 'would practically constitute a judicial repeal of the Civil Rights Acts.'" Shaw v. Garrison, 545 F.2d 980, 983-84 (5th Cir. 1977), *quoting* Jobson v. Henne, 355 F.2d 129, 133 (2d Cir. 1966).

[272] 416 U.S. 232 (1974).

[273] *Id.* at 235.

[274] Krause v. Rhodes, 471 F.2d 430, 433-37 (6th Cir. 1972).

[275] The Court did, however, make reference to the common law in rejecting its incorporation into § 1983 in order to grant the chief executive absolute immunity. 416 U.S. at 245-46. See note 271 *supra*.

[276] *Id.* at 245-49. The Court's treatment of this part of the opinion is, at best, questionable. *Cf.* O'Connor v. Donaldson, 422 U.S. 563 (1975) (suit against mental institution administrator; no reference to "scope of discretion and responsibilities of the office");

> It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[277]

Less than a year later, it returned to the subject in *Wood v. Strickland*,[278] where high school students had been suspended for allegedly "spiking" the punch at a school function.[279] Reviewing the "good faith" requirement without the aid of explicit Supreme Court precedent,[280] the district court had charged the jury that it "must find that [the defendants] acted with malice toward the plaintiff,"[281] defining malice as "ill will against a person—a wrongful act done intentionally without just cause or excuse."[282] The Court of Appeals for the Eighth Circuit disagreed: "It need only be established that the defendants did not, in the light of all the circumstances, act in good faith. The test is an objective, rather than a subjective, one."[283] In seeking to clarify the

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Wood v. Strickland, 420 U.S. 308, 314 (1975) (holding school board members to a higher degree of knowledge of the law). At one point, the Court recognized the distinct parallel between acts of police officers and governors:

> In common with police officers, . . . officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office.

416 U.S. at 246. It continued, however, by elevating a chief executive's decision-making process to a much higher plane:

> [S]ince the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad.

Id. at 247.

The latter analysis apparently dilutes § 1983 liability in direct proportion to the range of discretion attributed to a defendant. Placing the split-second decisions of police officers on a level less deserving of judicial sensitivity than those made within the confines of an office by a governor and his highly paid and qualified advisors raises serious questions concerning the propriety of such an approach. This is especially true if one appreciates the fact that the potential for constitutional damage increases with the level of responsibility and scope of discretion.

[277] 416 U.S. at 247-48.

[278] 420 U.S. 308 (1975).

[279] Two causes of action were alleged: (1) a violation of substantive due process since there was no evidence that the beverage used was an intoxicating liquor under state law; and (2) violations of procedural due process arising from the methods used in the suspension. *Id.* at 309-10.

[280] Strickland v. Inlow, 348 F. Supp. 244, 251-54 (W.D. Ark. 1972), *rev'd*, 485 F.2d 186 (8th Cir. 1973), *vacated and remanded sub nom.*, Wood v. Strickland, 420 U.S. 308 (1975).

[281] 348 F. Supp. at 248.

[282] *Id.*

[283] 485 F.2d 186, 191 (8th Cir. 1973). The application of conflicting standards reflected the consternation existing in the lower courts. *See* 420 U.S. at 315 (detailing the varying standards employed at that time).

confusion, Mr. Justice White, writing for the Court, declared:

> [T]he appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law . . . than by the presence of actual malice.[284]

Equating actual malice with a lack of knowledge of "basic, unquestioned constitutional rights,"[285] *Strickland* announced a standard parallel, but not identical to that enunciated in *Scheuer.*

> [There is no immunity] for damages . . . if [the defendant] [1] knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or [2] if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . .[286]

Although the Court carefully limited the holding to "the specific context of school discipline,"[287] any doubt concerning its general applicability was laid to rest three months later in *O'Connor v. Donaldson.*[288]

Suit was brought by a former mental patient alleging that the superintendent of the hospital "intentionally and maliciously deprived him of his constitutional right to liberty."[289] The district court instructed the jury that monetary damages could be assessed against the defendant if he did not believe "reasonably" and "in good faith" that continued confinement was "proper,"[290] and that punitive damages were assess-

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[284] 420 U.S. at 321.

[285] *Id.* at 322.

[286] *Id.* The obvious mandate that state officials assume the risk for decisions made without reference to legal authority, *id.* at 321-22, as contrasted with the *Scheuer* "reasonable grounds formed at the time" standard, produced rather unpersuading reasoning by the dissent:

> Moreover, even if counsel's advice constitutes a defense, it may safely be assumed that few school boards and school officials have ready access to counsel or indeed have deemed it necessary to consult counsel on the countless decisions that necessarily must be made in the operation of our public schools.

Id. at 331 (Powell, J., dissenting).

[287] *Id.* at 322.

[288] 422 U.S. 563 (1975).

[289] *Id.* at 565.

[290] The full charge to the jury was as follows:

> The defendants in this action rely on the defense that they acted in good faith. Simply put, defendants contend they in good faith believed it was necessary to detain plaintiff . . . for treatment for the length of time he was so confined. If the jury should believe from a preponderance of the evidence that

able if the defendant acted "maliciously or wantonly or oppressively."[291] Acknowledging the propriety of the charge under *Strickland*,[292] the Court turned to the "knew or reasonably should have known" criteria in light of the defendant's argument that "he could not reasonably have been expected to know that the state law [authorizing continued detention] as he understood it was constitutionally invalid."[293] The case was reversed and remanded on this issue since "[f]or purposes of the [knew or reasonably should have known] question, an official has, of course, no duty to anticipate unforeseeable constitutional developments."[294]

Within the fifteen-year *Monroe-O'Connor* milieu, the Fifth Circuit[295] has been forced to lay aside substantial precedent developed as a

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> defendants reasonably believed in good faith the detention of plaintiff was proper for the length of time he was confined then a verdict for defendants should be entered even though the jury may find the detention to have been unlawful.
>
> However, mere good intentions which do not give rise to a reasonable belief that detention is lawfully required [the *Scheuer* standard] cannot justify plaintiff's confinement.

Donaldson v. O'Connor, 493 F.2d 507, 527 (5th Cir. 1974), *vacated*, 422 U.S. 563 (1975).

[291] 422 U.S. 577 n.7.

[292] *Id.* at 577.

[293] *Id.* at 576. The statute's infirmity was its authorization for confinement of those "harmlessly mentally ill." *Id.* at 575. Refusal to give a "good faith" instruction incorporating reliance on state law had been approved by the Fifth Circuit, presumably on the basis that the cause of action was grounded in "false imprisonment." See notes 296 through 300 *infra.*

[294] *Id.* at 577. The statement was accompanied by the following less than subtle announcement by the Chief Justice in concurrence:

> I have difficulty understanding how the issue of immunity can be resolved on this record and hence it is very likely a new trial on this issue may be required; if that is the case *I would hope* these sensitive and important issues would have the benefit of more effective presentation and articulation.

Id. at 578 n.1 (Burger, C.J., concurring) (emphasis added).

[295] In reviewing Fifth Circuit precedent on the issue of the appropriate standard to be used to impose § 1983 liability, damage suits against federal officers under 28 U.S.C. § 1331 (amended 1976) must also be consulted. In Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388 (1971), the Court held that a damage remedy for violations of the fourth amendment by federal officers could be implied directly from the Constitution. *See generally* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532 (1972); Note, *supra* note 63, 925-29. Laying aside the issue of whom the remedy may be asserted against, the Fifth Circuit holds that the *Bivens* principle does not depend on a particular cause of action and is not limited to fourth amendment violations. Davis v. Passman, 544 F.2d 865, 872-74 (5th Cir.) (fifth amendment equal protection), *rehearing en banc granted*, 553 F.2d 506 (5th Cir. 1977); Rodriguez v. Ritchey, 539 F.2d 394, 399 (5th Cir. 1976) (reviewing established parallels between § 1983 causes of action and the *Bivens* principle), *rev'd en banc on other grounds*, 556 F.2d 1185 (5th Cir. 1977); Reeves v. City of Jackson, 532 F.2d 491, 495 (5th Cir. 1976) (eighth amendment); Weir v. Muller, 527 F.2d 872, 873 (5th Cir. 1976) (per curiam) (fifth amendment); Roane v. Callisburg Independent School Dist., 511 F.2d 633, 635 n.1 (5th Cir. 1975) (fourteenth amendment due process). Applying this expanded view of *Bivens*, the circuit has

consequence of the tort-common law approach established in *Monroe* and *Pierson*. In *Whirl v. Kern*,[296] a section 1983 suit was brought against a jailer who failed[297] to release an inmate. Citing *Pierson*, the court held that "§ 1983 [should] be read against the background of tort liability"[298] and "thereby . . . 'good faith' [is] a defense to a suit under § 1983 only where it is *also* a defense 'under the prevailing view [of tort law] in this country.' "[299] Concluding that the "prevailing view" did not permit the defense of good faith in a false imprisonment suit, "neither

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employed standards of liability paralleling those of § 1983 in § 1331 suits against federal officials. *See* Davis v. Passman, 544 F.2d 865, 881-82 (5th Cir.) (suit against congressman; *Scheuer* qualified immunity standard applied), *rehearing en banc granted*, 553 F.2d 506 (5th Cir. 1977); Rodriguez v. Ritchey, 539 F.2d 394, 400-01 (5th Cir. 1976) (suit against FBI agents; good faith defense available although "by whatever name, [§ 1983 or § 1331] the result is the same"), *rev'd en banc on other grounds*, 556 F.2d 1185 (5th Cir. 1977); Weir v. Muller, 527 F.2d 872, 873-74 (5th Cir. 1976) (per curiam) (suit against federal officials and federal agencies; *Scheuer* qualified immunity standard suggested to trial court for use on remand). The Supreme Court has granted certiorari on the issue. Economou v. Department of Agriculture, 535 F.2d 688, 690-96 (2d Cir. 1976) (applicability of good faith defense to Secretary of Agriculture and other federal officials), *cert. granted sub nom.* Butz v. Economou, 97 S. Ct. 1097 (1977).

As a collateral matter, the interplay between § 1983 and § 1331 is interesting for other reasons. With no reference to a "person" requirement, § 1331 presents an alternative to § 1983 and § 1343(3) in an attempt to either: (1) seek enforcement of relief in the form of past benefits wrongfully withheld by a "nonperson," *i.e.* equitable restitution, or (2) impose a damage remedy against a "nonperson" under the theory of respondeat superior. As previously discussed, see note 94 and accompanying text *supra*, § 1331 is available to secure retroactive benefits. However, the issue is open as to whether a damage remedy is available against § 1983 "nonpersons" under § 1331. Stapp v. Avoyelles Parish School Bd., 545 F.2d 527, 531 n.7 (5th Cir. 1977); Reeves v. City of Jackson, 532 F.2d 491, 495 (5th Cir. 1976). In view of developing precedent elsewhere in the country, there is a distinct possibility that the remedy will not be available, thus effectively bifurcating the "nonperson" exclusion in § 1331 actions depending upon the relief requested. *E.g.*, Jones v. McElroy, 429 F. Supp. 848, 853-61 (E.D. Pa. 1977) (refusing to imply a damage remedy against a municipality; legislative intent of the "person" provision in § 1983 carries over to the subsequently enacted § 1331); Crosley v. Davis, 426 F. Supp. 389, 396 (E.D. Pa. 1977) (absent a clearly defined need and legislative history, a damage remedy will not be implied); Grisham v. City of Chicago, 405 F. Supp. 410, 412 (N.D. Ill. 1975) (same). For detailed analyses of this issue, see Comment, *Implying a Damage Remedy Against Municipalities Directly Under the Fourteenth Amendment: Congressional Action as an Obstacle to Extension of the Bivens Doctrine*, 36 MD. L. REV. 123 (1976).

[296] 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969).

[297] The indictment against Whirl had been dismissed by a local judge. Although the information was transmitted to the jail, "the [defendant] testified that he was not apprised of [the] proceedings." 407 F.2d at 785. The case has been best described as a sheriff seeking "to parlay a jury finding of no negligence in overholding a prisoner for *nine months* into one of good faith." Bryan v. Jones, 519 F.2d 44, 47 (5th Cir. 1975) (Gee, J., dissenting), *rev'd en banc*, 530 F.2d 1210 (5th Cir.), *cert. denied*, 429 U.S. 865 (1976).

[298] 407 F.2d at 790, *quoting* Pierson v. Ray, 386 U.S. 547, 556 (1967).

[299] 407 F.2d at 791, *quoting* Pierson v. Ray, 386 U.S. 547, 555 (1967).

good faith nor non-negligence [was available to] exculpate [the defendant] from liability."[300] In keeping with *Whirl*, the circuit initiated a practice of assimilating section 1983 suits with their common law counterparts in order to determine the scope of available defenses.[301]

In *Bryan v. Jones*[302] an en banc court faced a factual situation almost identical to *Whirl* and adopted a new posture by concluding that *Strickland* and *O'Connor* undercut the basic premise established in *Whirl.*[303] Applying the "knew or reasonably should have known" standard to a jailer acting in a *supervisory* capacity, common law defenses were laid aside in favor of the following test:

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[300] *Id.* at 790, *citing* W. PROSSER, THE LAW OF TORTS 48 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 44, comment a, at 66 (1965). Judge Clark later reviewed the applicable principles:

> In an action for false imprisonment "[t]here may be liability although the defendant believed in good faith that the arrest was justified, or that he was acting for the plaintiff's own good" . . . . "To make the actor liable [for false imprisonment], it is only necessary that he intend to confine the other . . . . The actor's motives in confining the other are immaterial."

Bryan v. Jones, 519 F.2d 44, 45 (5th Cir. 1975) (citation omitted), *rev'd en banc*, 530 F.2d 1210 (5th Cir.), *cert. denied*, 429 U.S. 865 (1976).

[301] In Burton v. Waller, 502 F.2d 1261 (5th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975), the circuit dealt with § 1983 claims growing out of the Jackson State shootings. With respect to available defenses, the court commented:

> We entertain no doubts that the privilege of individual police officers to fire in self defense or to quell a riot are such common law defenses and may be asserted in response to the § 1983 cause of action to the same extent that they are relevant to the pendant Mississippi law claim.

Id. at 1274; *accord*, Johnson v. Greer, 477 F.2d 101, 104-05 (5th Cir. 1973) (detention in psychiatric clinic beyond lawful limit; defense of "good faith" intention to protect rejected as "mere good intentions"); Rodriguez v. Jones, 473 F.2d 599, 605-06 (5th Cir.) (forcible entry into wrong apartment and shooting of innocent plaintiffs; common law "reasonable belief" defense available), *cert. denied*, 412 U.S. 953 (1973); Dowsey v. Wilkins, 467 F.2d 1022, 1025 (5th Cir. 1972) (detention by police; "mere good intentions which do not give rise to a reasonable belief" not a defense). In Roberts v. Williams, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971), an inmate brought suit against the superintendent of a county penal farm for injuries sustained when a guard negligently shot him. Rejecting the defense of good faith, the court concluded:

> We [have] made it clear, however, that the origin of the good faith defense was "in the common law of torts not in the Civil Rights Act". The tort action here is based on negligence *and defendant has not shown us any case where good faith was a valid defense to a negligence action*. . . . We therefore reaffirm our holding in Whirl v. Kern, that improper motive is not a prerequisite to suit under section 1983.

Id. at 826 (emphasis added).

At the same time that the circuit was incorporating state common law criteria for determining available defenses, it also applied state law to expand liability. *See, e.g.*, Tuley v. Heyd, 482 F.2d 590, 594 (5th Cir. 1973) (vicarious liability in accord with state law); Lewis v. Brautigam, 227 F.2d 124, 128 (5th Cir. 1955) (respondeat superior liability imposed on sheriff pursuant to state law). These decisions correctly fall outside the *Pierson* analysis and within the ambit of 42 U.S.C. § 1988 (amended 1976), see note 262 *supra*, which consolidates available remedies provided by state law with § 1983. *See* Moor v. County of Alameda, 411 U.S. 693, 704 n.17 (1973) (noting with approval the Fifth Circuit position).

[302] 530 F.2d 1210 (5th Cir.) (en banc), *cert. denied*, 429 U.S. 865 (1976).

> In a case such as this one, where there is no discretion and relatively little time pressure, the jailer will be held to a high level of reasonableness as to his own actions. If he *negligently* establishes a record keeping system in which errors of this kind are likely, he will be held liable. But if the errors take place outside of his realm of responsibility, he cannot be found liable because he has acted reasonably and in good faith.[304]

In addition to altering the circuit's posture with respect to available defenses, *Bryan*, by imposing liability on a supervisory official for negligent conduct, raises the still unclear issue of the role which the degree of official misconduct plays in section 1983 damage litigation.

B. Negligence Liability

Intentional tortious behavior is the hallmark of section 1983 cases given plenary review by the Supreme Court.[305] Coupling the demise of the *Monroe-Pierson* "background of tort liability" approach with the

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[303] 530 F.2d at 1213-15.

[304] *Id.* at 1215 (emphasis added). What constitutes "good faith" under these circumstances, however, did not meet with unanimity. Judge Wisdom disagreed vehemently with the "outside of his realm of responsibility" exception and argued that the verdict should have been upheld pursuant to a jury finding that the defendant failed "to make a reasonable and timely investigation into the legal authority to imprison [the plaintiff]." 530 F.2d at 1218 (Wisdom, J., concurring in part and dissenting in part). Chief Judge Brown rationalized the result by concluding:

> If the sheriff of a metropolitan jail . . . does not set up an adequate system so that on successive layers of responsibility each person knows exactly what has happened to orders of the Court discharging prisoners, he could not possibly prove good faith. On the other hand, if he sets up a system that is reasonably watertight . . . and despite the good system and the conscientious performance of duty on the part of everyone concerned, a mistake occurs, clearly that is enough.

Id. at 1217 (Brown, C.J., concurring).

[305] The actions complained of are characteristically alleged to have been taken with a " 'malicious intention to cause a deprivation of constitutional rights.' " O'Connor v. Donaldson, 422 U.S. 563, 577 (1975) (hospital superintendent's alleged intentional refusal to release a mental patient), *quoting* Wood v. Strickland, 420 U.S. 308, 322 (1975); *see* Scheuer v. Rhodes, 416 U.S. 232, 235 (1974) (allegations of "intentional, willful and wanton" conduct on the part of a governor in calling out the national guard); Pierson v. Ray, 386 U.S. 547, 550 (1967) (alleged intentional unconstitutional behavior on the part of police); Monroe v. Pape, 365 U.S. 167, 168 (1961) (same). *See also* Estelle v. Gamble, 97 S. Ct. 285, 292 (1977) (eighth amendment violation for "acts or omissions sufficiently

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harmful to evidence deliberate indifference to serious medical needs"). Under the "knew or reasonably should have known" standard, which now equates malicious intention with a refusal to obey established constitutional mandates, see note 285 and accompanying text *supra*, *Strickland* alleged a failure to comply with substantive and procedural due process requirements while *O'Connor* dealt with a constitutional right to release. See notes 292 through 294 and accompanying text *supra.*

The circuit has a plethora of cases on intentional tortious behavior. *E.g.*, Bodeker v. Dyson, 544 F.2d 861, 862 (5th Cir. 1977) (per curiam) (illegal search and seizure); Sims v. Adams, 537 F.2d 829, 830 (5th Cir. 1976) (unlawful arrest and physical abuse); Harris v. Chanclor, 537 F.2d 203, 206 (5th Cir. 1976) (assault by arresting officer); Reeves v. City of Jackson, 532 F.2d 491, 494 (5th Cir. 1976) (arrestee not given prompt medical attention); Carter v. Noble, 526 F.2d 677, 678 (5th Cir. 1976) (per curiam) (use of excessive force on inmate); Palmer v. Hall, 517 F.2d 705, 706-08 (5th Cir. 1975) (fleeing juvenile misdemeanant shot by policeman); Hamilton v. Chaffin, 506 F.2d 904, 909 (5th Cir. 1975) (excessive force in apprehension and detention); Anderson v. Nosser, 456 F.2d 835, 838 (5th Cir. 1972) (en banc) (panel split between cruel and unusual punishment and a due process violation in prison brutality case), *cert. denied*, 409 U.S. 848 (1973); Nesmith v. Alford, 318 F.2d 110, 115 (5th Cir. 1963) (false arrest and malicious prosecution), *cert. denied*, 375 U.S. 975 (1964); Brazier v. Cherry, 293 F.2d 401, 402 (5th Cir.) (homicide), *cert. denied*, 368 U.S. 921 (1961); Lewis v. Brautigam, 227 F.2d 124, 128 (5th Cir. 1955) (coerced confession).

The "knew or should have known" peg for liability has generated a separate line of decisions. As early as 1963, the court announced its position in a first amendment case involving demonstrators arrested when they were surrounded by an "outraged" and threatening crowd. Nesmith v. Alford, 318 F.2d 110, 125 (5th Cir. 1963), *cert. denied*, 375 U.S. 975 (1964). Following established Supreme Court precedent, the court rejected a "good faith" defense based on ignorance of the law and permitted recovery of damages from the arresting officers. 318 F.2d at 120-21. At this point, the position assumed by the circuit apparently requires direct constitutional authority for the rights alleged to have been violated before the defendant can be held liable in a § 1983 suit, *i.e.* decisions establishing general propositions of constitutional law are insufficient to generate personal damages under the "knew or reasonably should have known" criteria. *Compare* Sapp v. Renfroe, 511 F.2d 172, 176-77 (5th Cir. 1975) (conscientious objector had no "clearly established right" not to attend ROTC training at time request for exclusion was rejected by school board) *with* Jagnandan v. Giles, 538 F.2d 1166, 1173 (5th Cir. 1976) (no established precedent that statute requiring tuition payments by resident alien was unconstitutional), *cert. denied*, 97 S. Ct. 2959 (1977); *accord*, Traylor v. City of Amarillo, 492 F.2d 1156, 1157 n.2 (5th Cir. 1974) (ordinances at issue "were constitutional, both facially and as applied); Sartin v. City of Columbus Util. Comm'n, 421 F. Supp. 393, 398-99 (N.D. Miss. 1976) (discharge not unreasonable "in light of due process precedent prevailing at that time"). In Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975), the court imposed liability on a college president, finding a violation of students' "*basic unquestioned constitutional rights*." *Id.* at 261 (citation omitted). Commenting on a perceived "good faith" defense:

> The district court acknowledged that the president was not "motivated by malice . . . perhaps he thought he had a right to do what he did; he probably did think so." Nevertheless [it] found that [the president] did not seek legal advice prior to his actions and [we approved the finding] that the sort of motivation for his actions which the proof established did not constitute a defense.

Id. at 261.

section's legislative history,[306] however, conduct rising only to a definitional level of "negligence"[307] is presumptively actionable in one unique

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[306] *E.g.*, S. REP. No. 1, 42d Cong., 1st Sess. 374 (1871) (report on Ku Klux Klan outrages). See notes 18 *supra* & 308 *infra*. Also relevant to a proper construction of § 1983 is its constitutional authorization by the fourteenth amendment. Both were initiated by the same Reconstruction Congress, see note 21 *supra*, and were prompted by identical federal interests with relation to conduct in some of the southern states. A clear parallel exists vis-à-vis requiring elements of intentional or purposeful conduct for purposes of claims relating to discrimination. *Compare* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (facially neutral municipal ordinance held discriminatory as applied) *and* Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960) (no municipal purpose other than racial discrimination shown for city's redistricting plan) *with* Washington v. Davis, 426 U.S. 229, 245-48 (1976) (personnel test racially neutral on its face held valid despite racially disproportionate impact) *and* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555, 563 (1977) (no proof of racially discriminatory intent or purpose in refusal to rezone to allow construction of low income housing). *Cf.* Estelle v. Gamble, 97 S. Ct. 285, 292 (1977) ("deliberate indifference" standard employed for determining eighth amendment violations arising out of state prison's failure to provide medical care).

[307] The entire issue of "negligence liability" is, at best, poorly defined. At its worst, the judicial approach is based on the ill-conceived tort standard of *Monroe* or a failure to appreciate the fact that although Congress expressed no clear intention "to take over the whole field of ordinary state torts," transgressions by state officials "made possible by [their] position, are far more serious than an ordinary state tort, and therefore . . . a matter of federal concern." Monroe v. Pape, 365 U.S. 167, 193 (1961) (Harlan, J., concurring). *See also* Paul v. Davis, 424 U.S. 693, 700-01 (1976) (dictum reference that § 1983 was not designed for the development of a body of general tort law). An unarticulated insight into the foregoing working premise is supplied by contrasting Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970) with Walton v. Salter, 547 F.2d 824 (5th Cir. 1977) (per curiam), *amending on denial of rehearing*, No. 76-1389 (5th Cir. July 14, 1976) (withdrawn from publication by order of the court). In *Jenkins* liability was imposed for a police officer's "gross and culpable" negligence in handling his gun during an arrest; *Walton*, on the other hand, denied the existence of a cause of action when the plaintiff alleged gross negligence by a police officer's driving his vehicle on official business even though acquiescing in the argument that a cause of action would be stated if a "general pattern" rather than an "isolated act" were involved. 547 F.2d at 825. These conclusions can be reconciled by Mr. Justice Harlan's approach to § 1983 tort liability for injuries uniquely associated with and "made possible by [the defendant's] position," 365 U.S. at 193, which clearly distinguishes a gun, peculiar to a police officer, from a car which is driven by both the police and the general public. *Accord*, Note, *supra* note 63, at 953 (finding no distinction between injuries inflicted by a negligently driven police car and a privately-owned milk truck).

The Fifth Circuit position on the negligence question is far from stabilized. In Whirl v. Kern, 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969), the court concluded without qualification that *Monroe* "suggests that a federal forum is no less desirable for the *inadvertent* than for the malicious violation of constitutionally protected rights." 407 F.2d at 788 (emphasis added). In the wake of *Scheuer*, *Strickland* and *O'Connor*, however, the circuit signaled a change in course in *Walton*. Reviewing the trial court's findings "that a negligence action does not provide a basis for federal jurisdiction," 547 F.2d at 825, the original panel concluded: "As a general matter, the court's statement was erroneous: negligence may in some cases be the basis for a § 1983 action." No. 76-1389, slip op. at 4499 (5th Cir. July 14, 1976). The amended opinion deleted all reference to this assertion, concluding that § 1983 should not be "transformed into an avenue for any type situation: constitutional injury resulting from an act peculiarly associated with powers and responsibilities arising under state law. Specifically, Congress directed its attention at length not only to those who "subject" others to injury but also to those who "cause to be subjected" and in so doing focused on state officials whose abdication of affirmatively imposed[308] responsibilities of office worked to the constitutional detriment of others.

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of general tort action against government officials." 547 F.2d at 285. Judge Tjoflat, a member of the *Walton* panel, had expressed his views earlier:

> Even if it is assumed *arguendo* that a constitutional tort has been perpetrated . . . [i]t is not at all clear to me what the majority sees as the relationship between immunity and negligence . . . . If . . . mere negligence waives an officer's immunity, I must disagree . . . . *To lose his immunity, an officer must have acted at least intentionally, if not maliciously.* This, of course, can be proved by the acts themselves if they are so flagrant that intent can be readily inferred.

Rodriguez v. Ritchey, 539 F.2d 394, 407 n.16 (5th Cir. 1976) (Tjoflat, J., concurring in part, dissenting in part) (emphasis added). *Compare* Rodriguez v. Ritchey, 539 F.2d 394 (5th Cir. 1976), *rev'd on other grounds*, 556 F.2d 1185 (5th Cir. 1977) (cause of action permissible for negligent arrest of the wrong person) *and* Fox v. Sullivan, 539 F.2d 1065, 1066 (5th Cir. 1976) (cause of action allowed against guard who "negligently" placed inmate in a position to be stabbed) *with* Gandy v. Panama City, 505 F.2d 630, 630-31 (5th Cir. 1974) (per curiam) (no cause of action absent use of excessive force in an arrest). For a case possibly posing the issue for Supreme Court determination, see Navarette v. Enomoto, 536 F.2d 977 (9th Cir. 1976) (negligent failure to mail outgoing prison mail), *cert. granted sub nom.*, Procunier v. Navarette, 97 S. Ct. 783 (1977).

> [308] [B]ut even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or a refusal to enforce their provisions, a portion of the people are denied [constitutional rights]. . . .

CONG. GLOBE, 42d Cong., 1st Sess., app. at 153. As described in notes 48 through 50 *supra*, a major portion of the legislative history deals with the inability or recalcitrance of responsible state officials to deal with lawless behavior. As President Grant stated in his message to Congress: "A condition of affairs now exists in some States . . . rendering life and property insecure . . . . The proof that such a condition of affairs exists in some localities is now before the Senate." CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871). The theme set by the President continued throughout the debates:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. . . . Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.

Id. at 374 (remarks of Representative Lowe).

> [C]ertain States have denied to persons within their jurisdiction the equal protection of the laws. . . . [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.

Id. at 428 (remarks of Representative Beatty). Speaking specifically of the lack of enforcement of existing law, other advocates noted:

> There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty. . . . It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, *neglect*, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.[309]

This limited negligence liability, obviously directed at state officials in positions of responsibility,[310] fits comfortably with the

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> Now it is an effectual denial by a State of the equal protection of the laws when any class of officers [is] charged under the laws with their administration permanently and as a rule refuse to extend that protection.

Id. at 334 (remarks of Representative Hoar).

> But it is a fact, asserted in the report, that of the hundreds of outrages committed upon loyal people . . . not one has been punished. This defect in the administration of the laws [only occurs] when a man of known Union sentiments, white or black, invokes their aid.

Id. at 505 (remarks of Senator Pratt).

[309] Monroe v. Pape, 365 U.S. 167, 176, 180 (1961) (emphasis added).

[310] The availability of § 1983 negligence liability against responsible officials does not include that imputed through the doctrine of respondeat superior. While the debates discussing the Sherman Amendment and municipal liability, notes 61 & 62 and accompanying text *supra*, arguably accepted such potential liability—thus necessitating exclusion of political subdivisions—it is clear that the concept plays no role in § 1983 litigation. Even accepting the *Pierson* Court's rejected premise that § 1983 is to be read against a "background of tort liability," 386 U.S. at 556, *quoting* Monroe v. Pape, 365 U.S. 167, 187 (1961), under the common law the doctrine of respondeat superior had no application to actions brought against public officials. *See* Schirott & Drew, *The Vicarious Liability of Public Officials Under the Civil Rights Act,* 8 AKRON L. REV. 69, 72 (1974). Moreover, the basic policy reasons behind "imputed negligence" do not hold up when the "pocket" sought is that of a government official:

> What has emerged as the modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will, on the basis of all past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.

W. PROSSER, LAW OF TORTS § 69 at 459 (4th ed. 1971) (footnotes omitted). In contrast, government officials are not in a profit-making enterprise and thus are unable to distribute and allocate the loss. On this particular point the Eighth Circuit concludes:

> With such justification in mind the "master" of course, is and can only be the municipality employing the appellees. It is the city who set the enterprise in motion, who "profits" from the appellees' labor and who, if held liable in such

Strickland-O'Connor rationale. Official inaction will result in liability when gauged by the "knew or reasonably should have known" standard if: (1) there is an affirmative state law obligation[311] and (2) the constitutional harm could have been anticipated as a natural consequence of passive or active negligence[312] vis-à-vis the state-imposed duty.

> instances, can by its powers of taxation spread the resulting expenditures amongst the community at large.

Jennings v. Davis, 476 F.2d 1271, 1275 (8th Cir. 1973) (footnote omitted).

Apart from this inability to impute liability, is the parallel proposition that liability cannot be imposed on those who have no connection with the constitutional violation at issue. *See* Anderson v. Nosser, 456 F.2d 835, 841 (5th Cir.) (en banc) (city police defendants not liable for § 1983 claims arising from prison mistreatment), *cert. denied*, 409 U.S. 848 (1972). In Perry v. Jones, 506 F.2d 778, 780 (5th Cir. 1975), the court stated:

> We think that as to the Chief of Police . . . the directed [verdict was] properly granted. [He] had no knowledge of [the plaintiff's] arrest. He did not direct it or participate in it. . . . In other words, he was in no way responsible for [what happened].

Accord, Ford v. Byrd, 544 F.2d 194, 195 (5th Cir. 1976) (vicarious liability only if superior "directs, orders, participates in, or approves the acts"); Tuley v. Heyd, 482 F.2d 590, 594 (5th Cir. 1973) (no cause of action stated where plaintiff failed to allege defendant's personal involvement). *See also* Hines v. Wainwright, 539 F.2d 433, 434 (5th Cir. 1976) (per curiam) (no participation alleged). The type of personal involvement sufficient to invoke liability has many manifestations. *Compare* Sims v. Adams, 537 F.2d 829, 831-32 (5th Cir. 1976) (cause of action stated against supervisory defendants who had knowledge of police officer's demonstrated propensity to use excessive force) *and* Lewis v. Brautigam, 227 F.2d 124, 128 (5th Cir. 1955) (personal participation in extracting confession) *with* Palmer v. Hall, 517 F.2d 705, 708-09 (5th Cir. 1975) (no cause of action where no causal connection between mayor's "shoot to kill" order and subsequent shooting by police officer) *and* Chestnut v. City of Quincy, 513 F.2d 91, 92 (5th Cir. 1975) (record failed to show that supervisory official should have been aware of police officer's propensity for violence). *See also* Kellerman v. Askew, 541 F.2d 1089, 1092 (5th Cir. 1975) (per curiam) (actual notice to supervisory officials of denial of medical treatment); Harris v. Chanclor, 537 F.2d 203, 206 (5th Cir. 1976) (acquiesence reaching level of "deliberate indifference" by supervisory official where subordinate beat inmate); Taylor v. Gibson, 529 F.2d 709, 715 (5th Cir. 1976) (conspiracy between private physician and sheriff); Nesmith v. Alford, 318 F.2d 110, 125-26 (5th Cir. 1963) (conspiracy between subordinates and supervisory officials), *cert. denied*, 375 U.S. 975 (1964).

[311] *E.g.*, Jones v. Diamond, 519 F.2d 1090, 1100-01 (5th Cir. 1975) (*Strickland* standard applied to breach of affirmative state duty). *See also* Kellerman v. Askew, 541 F.2d 1089, 1091-92 (5th Cir. 1976) (per curiam) (affirmative duty imposed on state officials to ascertain standard of medical care in prison facility).

[312] This inquiry necessarily incorporates the concept of foreseeability into the standard. *See generally* Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). *But cf.* 162 N.E. at 103 (Andrews, J., dissenting):

> Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.
>
> . . . .
>
> A boy throws a stone into a pond. The ripples spread. The water level rises. The history of that pond is altered to all eternity. It will be altered by other causes also. Yet it will be forever the resultant of all causes combined.

The circuit's approach reflects this philosophy. In *Roberts v. Williams*,[313] a county prison farm inmate suffered injuries due to the alleged "gross negligence"[314] of a "trustee" guard who mishandled his weapon. Named as defendants were the superintendent of the camp as well as the individual members of the supervisory board responsible for the facility. Finding an *affirmative duty* under state law[315] to train and supervise inmates handling weapons, the *negligent breach* of which was the proximate cause of the injury,[316] the court imposed liability on the superintendent. The board, on the other hand, was absolved. Absent a history of similar shootings,[317] its obligation to the inmate population was found to be only general in nature.[318] Indeed, even if the board had been under an affirmative duty there still could be no liability:

> [T]here is no basis for a finding that the Supervisors might have foreseen [that their inactivity] would create a hazard of accidental shooting . . . . The trial judge's findings assign the cause of the catastrophe to the failure to train [the inmate guard] in the safe use of his firearm, and this is a failure in something the Supervisors had a right to expect the [superintendent] . . . to know the need of.[319]

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[313] 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971). Although the decision was limited to granting relief under the pendent state law claim, 456 F.2d at 835 (Nichols, J., addendum opinion), the § 1983 approach to liability correctly reflects the approach advocated.

[314] An allegation presumably sufficient to state a cause of action against a judgment-proof defendant. See note 307 *supra*.

[315] The court cited Farmer v. State, 224 Miss. 96, 79 So. 2d 528 (1955), for the proposition that the superintendent "owed a duty to the prisoners in his charge to exercise ordinary and reasonable care to protect them from unnecessary harm and for the preservation of their life and health." 456 F.2d at 822.

[316] The court approved the following finding of fact:

> Since the shooting in this case occurred under the most needless and avoidable circumstances, it is patent that [the inmate guard] was thoroughly ignorant—indeed incompetent—in the handling of a firearm. . . . The negligence of [the superintendent] in this respect, combined with the negligence of [the guard] in mishandling the gun, produced a classic case of causation which proximately resulted in the shooting of and personal injuries to plaintiff.

456 F.2d at 823.

[317] See notes 310 *supra* and 319 *infra* with respect to § 1983 liability imposed on supervisory officials having actual notice of subordinates' propensities to violate constitutional rights.

[318] State law provided only that the county board of supervisors "shall establish all proper regulations for the working, guarding, safekeeping, clothing, housing, and subsistence of convicts." 456 F.2d at 829, *quoting* MISS. CODE ANN. § 7904 (1942) (current version at MISS. CODE ANN. § 47-1-9 (1972). The record was devoid of evidence that this provision alone imposed specific obligations regarding weapons handling.

[319] 456 F.2d at 832. *Roberts* has a substantial progency. In Sims v. Adams, 537 F.2d 829 (5th Cir. 1976), suit was brought against the mayor of Atlanta, the police chief and members of the board of aldermen for excessive force used by a policeman. The court

As noted, utilization of the negligence approach is also exemplified by *Bryan v. Jones,*[320] a suit which, in addition to naming the sheriff, joined a prosecuting attorney. The court held the latter absolved of liability, finding no "affirmative duty [imposed] upon a district attorney to investigate the legal basis for each prisoner's confinement."[321] The sheriff, however, had a clear duty to ascertain the validity of each prisoner's confinement,[322] although the scope of the particular duties offered the possibility of a "good faith" defense: "We know that with 1600 prisoners and 15 Courts with criminal jurisdiction, each issuing orders concerning detention and release, the Sheriff . . . cannot possibly do everything."[323] "He . . . must have subordinates, who also have subordinates—each must depend upon the other. Ascending the hierarchy each must depend upon reports from those below."[324] Proceeding in a framework parallel to the legislative intent of authorizing a cause of action against state officers who "neglect" to enforce state laws, a finding of liability where the defendant "knew or reasonably should

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found a history of abuses by the same policeman and concluded:

> [R]eview of the pertinent state law demonstrates that Sims' complaint states a cause of action against [the mayor and chief of police] because they . . . breached the duties . . . to control a policeman's known propensity for improper use of force. . . . [W]e [also] believe that the complaint states a cause of action against [members of] the two Police Committees based on the breach of their duty to discipline policemen whose recent culpable conduct had been brought to their attention.

Id. at 832. *See also* Kellerman v. Askew, 541 F.2d 1089, 1092 n.3 (5th Cir. 1976) (per curiam) (breach of official's duty to provide adequate medical care); Jones v. Diamond, 519 F.2d 1090, 1100-01 (5th Cir. 1975) (failure to provide necessary sanitary facilities in jail); Beverly v. Morris, 470 F.2d 1356, 1357 (5th Cir. 1972) (per curiam) (auxiliary police officer who blackjacked plaintiff had received no supervision or training). *See also* Carter v. Estelle, 519 F.2d 1136 (5th Cir. 1975) (per curiam) (remand of case involving *Roberts* issues); Holland v. Connors, 491 F.2d 539 (5th Cir. 1974) (per curiam) (same); Parker v. McKeithen, 488 F.2d 553 (5th Cir.) (same), *cert. denied*, 419 U.S. 838 (1974).

[320] 530 F.2d 1210 (5th Cir.) (en banc), *cert. denied*, 429 U.S. 865 (1976).

[321] 519 F.2d 44, 45 n.1 (5th Cir. 1975), *rev'd and remanded on other grounds*, 530 F.2d 1210 (5th Cir.) (en banc), *cert. denied*, 429 U.S. 865 (1976).

[322] While not elaborated upon in *Bryan*, the opinion in Whirl v. Kern, 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969), also a Texas case, discusses state law duties:

> In the case at bar [the sheriff was] charged with the same statutory duty "to make investigation" . . . . [T]he statutory duty of a sheriff to protect his prisoners is the statutory duty to make investigation of the authority upon which [prisoners] are held.

407 F.2d at 794. The *type* of obligation imposed is so clear that in *Whirl* the circuit concluded that "the duty to release is absolute [even] if no [statutory] authority exists." *Id.*

[323] 530 F.2d 1210, 1216 (5th Cir. 1976) (Brown, C.J., specially concurring).

[324] *Id.*

have known" that his failure to administer the department in accord with affirmative state responsibilities, albeit "negligently," would likely result in constitutional injury.[325]

IV. CONCLUSION

Completion of the person, state action and damage gauntlet places the reader at an appropriate midpoint of the total monograph. Embarking on a totally different subject matter—declaratory and injunctive relief—the second installment will continue with an analysis of sections 1981, 1982 and 1985(3), concluding with an overview of the entire circuit precedent as it relates to the viability of the law heretofore fashioned in future litigation.

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[325] See note 304 and accompanying text *supra*. The only reference to the issue by the Supreme Court is found in Rizzo v. Goode, 423 U.S. 362 (1976), which held that absent a pattern of intimidation flowing from a deliberate plan involving supervisory officials, injunctive relief against those officials is unavailable. *Id.* at 373-76. Not at issue in the decision, however, was "the question under what circumstances failure to supervise will justify an award of money damages." *Id.* at 385 (Blackmun, J., dissenting). The case has been so limited by the Fifth Circuit. Sims v. Adams, 537 F.2d 829, 832 (5th Cir. 1976).

In Bogard v. Cook, 405 F. Supp. 1202 (N.D. Miss. 1975), *appeal docketed*, No. 76-2890 (5th Cir. July 13, 1976), a jury awarded an inmate an aggregate sum of $500,000 for injuries sustained while incarcerated at the Mississippi State Penitentiary. Among those found liable were two superintendents and an assistant superintendent not directly involved in the injuries sustained but found negligent in the performance of their duties by the jury. In entering a judgment notwithstanding the verdict, Judge Smith distinguished Roberts v. Williams, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971), on the basis that a different standard of "negligence liability" should apply to supervisors of a large central facility as distinguished from local units. 405 F. Supp. at 1216. In addition, as a matter of policy,

> two undesirable consequences [would result from an imposition of liability]. First, capable administrators and high-calibre employees would undoubtedly become difficult if not impossible to find . . . . Second, . . . it appears highly likely that every major and minor injury received . . . whether inflicted by a guard or another inmate, will result in a civil action on the docket of this court if liability is to be imposed on the basis of simple negligence [on the part of supervisory officials].

Id. at 1218.

The circuit's decision in Bryan v. Jones, 530 F.2d 1210 (5th Cir.) (en banc), *cert. denied*, 429 U.S. 865 (1976), obviously undercuts an approach to § 1983 diluting liability on the basis of supervisory responsibilities. As to the "undesirable consequences" which could result from imposing supervisory liability in a state's primary penal facility, the "good faith" standard—viewed in the context of the legislative history dealing with imposing liability on those state officers who through "neglect" or some other failure to fulfill state-imposed obligations—should distinguish between two types of official activity occurring within a physical environment which through a history of neglect by the legislative and executive branches produces a constant variety of § 1983 violations. First, that which can be likened to watching Rome burn, *i.e.* having been placed on notice, taking steps which can clearly be defined as de minimis vis-à-vis fulfilling state-imposed obligations such as the care and protection of inmates. Second, activity by the responsible official capable of generating a good faith defense, *i.e.* using the limited resources at his command in a manner most consonant with state law and constitutional obligations to minimize, though not totally obviate, those conditions giving rise to § 1983 litigation.

THE TAX REFORM ACT OF 1976: NEW HORIZONS IN ESTATE AND GIFT TAXATION

*Karen O. Green**
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After more than two years of congressional consideration, the Tax Reform Act of 1976 became law.[1] This latest tax reform measure is broad in scope and covers a variety of topics, ranging from simple extensions of tax cuts[2] initiated under the Tax Reduction Act of 1975[3] to highly complex modifications in the areas of tax shelters and foreign income.[4] By enacting these measures, Congress sought to achieve a number of admirable goals.[5] Foremost among these goals was the desire to create a tax system more equitable in its treatment of taxpayers of different income levels[6] and simpler in its application[7]—goals typical of any reform measure.[8] In addition, Congress hoped to stimulate a sagging economy through a permanent extension of the 1975 tax cuts,[9] the enactment of new economic incentives[10] and improved administration of the tax laws.[11] The final Congressional goal, and the one to be considered by this article, was the complete revamping of the estate and gift tax laws.[12] The portion of the Act designed to achieve this last goal, however, did not receive the same degree of intense scrutiny afforded most other sections of the Act. Instead, the estate and gift tax revisions were proposed, discussed and passed by Congress within a period of a few months.[13]

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[1] On June 23-25 and July 8-31, 1975, the House Ways and Means Committee held panel discussions and hearings on H.R. 10612, 94th Cong., 1st Sess. (1975). The bill was reported out of committee on November 12, 1975, and was passed by the House after consideration on December 3 and 4, 1975. *See* H.R. REP. No. 658, 94th Cong., 1st Sess. (1975) [hereinafter cited as 1975 H.R. REP.].

From March 17 through April 13 and from July 20-22, 1976, hearings were conducted before the Senate Committee on Finance. The bill was reported out of committee on June 10, 1976. *See* S. REP. No. 938, Parts 1 & 2, 94th Cong., 2d Sess. (1976) [hereinafter cited as 1976 S. REP.]. The Senate considered the proposal on June 16-18, 21-25, 28-30, July 1-2, 20-23 and 26-30, 1976, and, after three additional days of consideration, passed it on August 6, 1976.

On September 13, 1976, the Conference Committee submitted its report to the House as H.R. REP. No. 1515, 94th Cong., 2d Sess. (1976) [hereinafter cited as H.R. REP.] and to the Senate as S. REP. No. 1236, 94th Cong., 2d Sess. (1976). The Conference Report and H.R. Con. Res. 751, 94th Cong., 2d Sess. (1976), were approved by the House and Senate on September 16, 1976, and on October 4, 1976, the Tax Reform Act of 1976 was signed by President Ford.

[2] *E.g.*, Tax Reform Act of 1976, Pub. L. No. 94-455, § 901(a), 90 Stat. 1606 [hereinafter cited as 1976 Act] (amending I.R.C. § 11 (1954)) (corporate tax rates); 1976 Act § 401(b)(2) (amending I.R.C. § 141(b) (1954)) (percentage standard deduction); 1976 Act § 401(b)(1) (amending I.R.C. § 141(c) (1954)) (low income allowance).

[3] Act of Mar. 29, 1975, Pub. L. No. 94-12, 89 Stat. 27 (codified in scattered sections of I.R.C. (1954)).

[4] *E.g.*, I.R.C. § 465 ("at risk" limitation); 1976 Act § 1011(a) (amending I.R.C. § 911(c)(1) (1954)) (foreign earned income exclusion); 1976 Act § 1101 (amending I.R.C. § 995 (1954)) (taxation of DISC income).

[5] *See* 1975 H.R. REP., *supra* note 1, at 3.

[6] *Id.*; *see, e.g.*, I.R.C. § 465 ("at risk" limitations); 1976 Act § 1011(a) (amending

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I.R.C. § 911(c)(1) (1954)) (foreign earned income exclusion); 1976 Act § 301(a) (amending I.R.C. § 56(a) (1954)) (minimum tax).

[7] 1975 H.R. REP., *supra* note 5, at 3; *see, e.g.,* I.R.C. § 44(a) (child care credit); 1976 Act § 501(a) (amending I.R.C. § 3 (1954)) (tax tables for individuals).

[8] *See, e.g.,* H.R. REP. NO. 413, Parts 1 & 2, 91st Cong., 1st Sess. 8-12 (1969).

[9] See note 2 and accompanying text *supra.*

[10] 1975 H.R. REP., *supra* note 5, at 3; *e.g.,* I.R.C. § 46(f)(9) (additional investment credit); 1976 Act § 806(a) (amending I.R.C. § 172(b) (1954)) (operating loss carryover).

[11] 1975 H.R. REP., *supra* note 1, at 3, 16; *see, e.g.,* 1976 Act § 1202 (amending I.R.C. § 6103 (1954)) (confidentiality of returns); 1976 Act § 1204 (amending I.R.C. §§ 6851, 6853 (1954)) (jeopardy and termination assessments).

[12] *See* 1975 H.R. REP., *supra* note 1, at 8.

[13] The initial proposal for estate and gift tax reform was introduced by Congressman Al Ullman as H.R. 14844, 94th Cong., 2d Sess. (1976). At the time of introduction, however, this proposed legislation was not a part of the Tax Reform Act of 1976. The bill was reported out of the House Ways and Means Committee on August 2, 1976, and referred to the Committee of the Whole, where no subsequent action was ever taken on it.

H.R. 10612, 94th Cong., 1st Sess. (1975), had been reported from the House Ways and Means Committee on November 12, 1975, and was passed by the House on December 4, 1975. Thereafter, it was introduced in the Senate and referred to the Finance Committee on December 5, 1975. The committee report was not filed until July 23, 1976, see S. REP. NO. 938, 94th Cong., 2d Sess. (1976), and a supplemental report was filed July 23, 1976. *See id.*, Part 2. This latter report contained the Senate's initial consideration of the estate and gift tax reform proposals which were treated as amendments to H.R. 10612. The Senate Finance Committee report passed the House on August 6, 1976, but, because of existing variances between the House and Senate reports, the Senate requested a conference on August 6, 1976. The House agreed to the conference on August 23, 1976, and the Conference Report was filed in the House on September 13, 1976, as H.R. REP. NO. 1515, 94th Cong., 2d Sess. (1976) and in the Senate on September 14, 1976, as S. REP. NO. 1236, 94th Cong., 2d Sess. (1976).

With little debate, the House agreed to the Conference Report on September 16, 1976, but then receded to give separate consideration to the estate and gift tax provisions to which they concurred on the same day. Explaining the House's separate consideration of the estate and gift tax provisions, the Chairman of the House Ways and Means Committee, Congressman Al Ullman, stated:

> [T]he principal tax-reducing reform involves estate and gift taxes . . . . I preferred to do it [*i.e.* cut taxes for small and medium-sized estates] in a separate bill, but the parliamentary situation and the fact that only a few more weeks remain in the Congress mean that it is unlikely that such a separate bill can be enacted this year. Therefore, we have worked out a series of estate tax cuts and reforms in the conference. We are bringing this package back to the

The purposes for the estate and gift tax revisions were twofold—to eliminate tax avoidance and to provide some relief for small and medium-sized estates.[14] The major revisions attacking the so-called "tax loopholes" of prior law include the unified transfer tax system,[15] the absolute rule for taxation of transfers made within three years of death,[16] the carryover basis[17] and the tax on generation-skipping transfers.[18] As a means of affording relief for small and medium-sized estates, Congress adopted the unified tax credit,[19] the alternative method of valuing certain farms and other real estate,[20] larger estate and gift tax marital deductions,[21] more equitable treatment for qualified joint property interests[22] and extended periods for payment of estate taxes by certain estates.[23]

These new provisions, which make some dramatic changes in the estate and gift tax area, provide unlimited sources for discussion and comment. In considering the impact of the new law, this article will focus on two of the major conceptual changes effectuated by the Act—the unified system of taxing gratuitous transfers and the carryover basis. In addition, several related provisions, including the increased marital deductions, the joint property revisions and the absolute rule for taxing transfers made within three years of death will be analyzed in an effort to identify specific problems generated by the Act.

I. Changes in Rates and Exemptions

A. *The Unified System for Taxing Gratuitous Transfers*

With little debate or fanfare,[24] Congress adopted one of the more controversial proposals for reform in the estate and gift taxation area—the unified transfer system.[25] Unlike the separate estate and gift

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House in technical disagreement to give the House a chance to vote on estate and gift tax reform.

122 Cong. Rec. H10, 226-H10, 227 (daily ed. Sept. 16, 1976). This article was prepared before Congressman Ullman's introduction of H.R. 6715, 95th Cong., 1st Sess. (1977), intended to remedy many of the "technical and clerical mistakes in the tax laws" noted in succeeding discussions.

[14] H.R. Rep. No. 1380, 94th Cong., 2d Sess. 5 (1976) [hereinafter cited as 1976 H.R. Rep.].

[15] *See* 1976 Act § 2001(a)(1) (amending I.R.C. § 2001 (1954)); 1976 Act § 2001(b)(1) (amending I.R.C. § 2502 (1954)).

[16] *See* 1976 Act § 2001(a)(5) (amending I.R.C. § 2035 (1954)).

[17] I.R.C. § 1023.

[18] *Id.* §§ 2601-2622. *See generally* Sweeney & Wright, *New Tax on Generation-Skipping Transfers: A New Concept; Planning Implications,* 46 J. Tax. 66 (1977).

[19] I.R.C. §§ 2010, 2505.

[20] *Id.* § 2032(a).

[21] *See* 1976 Act § 2002(a) (amending I.R.C. § 2056(c) (1954)); 1976 Act § 2002(b) (amending I.R.C. § 2523(a) (1954)).

[22] I.R.C. § 2040(b).

[23] *Id.* § 6166.

[24] *See* 122 Cong. Rec. H10,242-H10,276, S16,016-S16,029 (daily ed. Sept. 16, 1976). *See generally* note 1 *supra.*

[25] *See* 1976 Act § 2001(a)(1) (amending I.R.C. § 2001 (1954)); 1976 Act § 2001(b)(1)

tax provisions of prior law,[26] this new system operates on the premise that all gratuitous transfers of property—whether inter vivos or testamentary, whether lump-sum or periodic—should be subjected to a uniform method of progressive taxation. The Tax Reform Act eliminates the separate estate and gift tax structures of prior law[27] and replaces them with a unified rate schedule[28] and a unified tax credit equally applicable to all gratuitous transfers. In doing so, the Act eliminates previously available exemptions.[29]

The provisions of prior law, whereby the tax rates and exemptions applicable to inter vivos transfers[30] and testamentary transfers[31] differed, offered three significant tax advantages well known to estate planners. The first was made possible because the gift tax rate for a given bracket of total taxable gifts[32] equalled three-fourths of the tax rate for the corresponding bracket of taxable testamentary transfers.[33] Through this differential in the tax rates, a taxpayer willing to part with dominion and control of his property[34] could avoid the higher estate tax by transferring his property during his lifetime rather than upon his death.[35] In addition, inter vivos transfers previously had no effect on the

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(amending I.R.C. § 2052 (1954)); I.R.C. §§ 2010, 2505.

[26] I.R.C. § 2001 (1954) (amended 1976); I.R.C. § 2501; I.R.C. § 2502 (1954) (amended 1976).

[27] *See* I.R.C. §§ 2001, 2502 (1954) (amended 1976).

[28] *See* 1976 Act § 2001(a)(1)(amending I.R.C. § 2001 (1954)); 1976 Act § 2001(b)(1) (amending I.R.C. § 2502 (1954)). The new rates are applicable to gifts made after December 31, 1976, and to the estates of taxpayers dying after that date. 1976 Act § 2001(d).

[29] *See* 1976 Act § 2001 (repealing I.R.C. §§ 2052, 2521 (1954)).

[30] I.R.C. §§ 2501 (taxation of property transfers by gift), 2502 (rate schedules), 2521-2523 (exceptions and deductions) (1954).

[31] I.R.C. §§ 2001 (tax on transfer of taxable estate and rate schedule), 2052-2056 (exemptions and deductions) (1954).

[32] The term "taxable gifts" was defined as the total amount of gifts made by the donor during the calendar quarter less the deductions provided for in sections 2521 (charitable), 2522 (gifts) and 2523 (marital). "The 'total amount of gifts' means the sum of the values of the gifts made during the calendar year less the amount excludable under § 2503(b)," $3,000 per donee per year. Treas. Reg. § 25.2503-1, T.D. 7238 (1972).

[33] The estate tax was imposed on the taxable estate by I.R.C. § 2001 (1954) (amended 1976). I.R.C. § 2051 defines "taxable estate" as the gross estate determined under *id.* § 2031, less the exemptions and deductions provided in *id.* §§ 2502-2556 (1954) (amended 1976). The effective taxable rate for a taxable estate of $50,000, for example, was 22%. I.R.C. § 2001 (1954) (amended 1976). The gift tax rate for the corresponding bracket of taxable gifts would have been 16 1/2%. I.R.C. § 2502 (1954) (amended 1976).

[34] Federal tax regulations require the donor to part with dominion and control of property before a transfer of that property will be deemed to be a "completed gift." If the donor reserves any power to change the disposition, he will be considered to have retained too much control. Treas. Reg. § 25,2511-2, T.D. 7238 (1972); *see, e.g.*, Estate of Sanford v. Commissioner, 308 U.S. 39, 41-44 (1939) (reservation of power to revoke in order to name new beneficiaries).

[35] This rule applies except in the case of transfers made "in contemplation of death." I.R.C. § 2035 (1954), *as amended by* 1976 Act § 2001(a)(5).

taxable rate applicable to testamentary transfers due to the operation of the separate rate schedules.[36] The estate of a decedent who had made significant lifetime transfers was thus in a position to avail itself of the lowest estate tax rates.[37] Finally, the gift tax paid on lifetime transfers, unlike the estate tax, was not includable in the tax base for purposes of imposing a transfer tax on the amount of the gift tax.[38]

Since these tax advantages accrued chiefly from the ability of taxpayers to make both lifetime and testamentary transfers, only those taxpayers wealthy enough to part with complete dominion and control over a portion of their assets before death could secure the maximum tax benefits. Taxpayers with small and moderately-sized estates, however, needed to preserve their estates to assure adequate financial security for their families and, consequently, could seldom obtain these benefits. For these reasons, Congress characterized the separate tax systems as discriminatory provisions which "principally benefited the wealthy and resulted in [an erosion of] the transfer tax base."[39] Apparently, Congress did not deem the willingness of taxpayers to part with the lifetime use and benefit of their property and to pay gift taxes immediately as a sufficient justification for the favorable tax treatment afforded lifetime transfers.[40]

The new law eliminates the first two advantages of the old system. Accordingly, in determining the taxable rate or the existence of an exemption (vis-à-vis the new tax credit) for any gratuitous transfer of property, whether inter vivos or testamentary, all prior gratuitous transfers enter the computation.[41] The immediate result of this system obviously will be to equalize the tax treatment of lifetime and testamentary transfers.

B. Operation of the Unified Rate Schedule

Tax rates under the unified rate schedule differ significantly from pre-1977 gift tax rates and slightly from pre-1977 estate tax rates. The new rates range from a minimum of 18% for taxable transfers of $10,000 or less to a maximum of 70% for taxable transfers in excess of $5 million.[42] Pre-1977 gift tax rates modestly ranged from 2 3/4% for taxable gifts of $5,000 or less to 57 3/4% for taxable gifts in excess of $10 million.[43] Thus, significantly higher taxes are imposed on lifetime transfers under the new system.[44] When compared with pre-1977 estate tax rates, however, the changes in rates appear less marked. The unified rates closely approximate pre-1977 estate tax rates with the exceptions of taxable amounts of $50,000 or less and taxable amounts in excess of $7 million.[45] In the former category the new rates are higher while in the latter category they are lower.[46]

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[36] I.R.C. §§ 2001, 2502 (1954) (amended 1976).

[37] For example, a tax rate of 22% would be imposed on a taxable estate of $50,000 even though the decedent made taxable gifts of $150,000 (taxed at a rate of 22 1/2%). *See* I.R.C. §§ 2001, 2502 (1954) (amended 1976).

[38] Even if a completed gift was determined under I.R.C. § 2035 (1954) (amended 1976) to have been a gift in contemplation of death and therefore includable in the decedent's gross estate, the amount of the gift tax paid on such a gift was not brought back into the estate since, at the time of the gift, the amount of tax due on such a transfer was not included in determining the amount taxable. In other words, there was no gift tax imposed on the gift tax. *See* I.R.C. § 2035 (1954) (amended 1976). This, however, was not the situation with respect to estate tax. Specifically, the money used to pay the estate tax liability was not excluded from the tax base used to determine the amount of tax due. *See* I.R.C. § 2051.

[39] 1976 H.R. REP., *supra* note 14, at 11.

[40] *See generally id.* at 11-12.

[41] See sections I. *B. & C. infra.*

The unified rate schedule is a progressive system of taxation whereby determination of the taxable rate for a particular taxable amount is dependent on all prior taxable transfers. Under this system, the tax computation is similar to the method of computing gift taxes

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[42] 1976 Act § 2001(a)(1) (amending I.R.C. § 2001 (1954)).

[43] I.R.C. § 2502 (1954), *as amended by* 1976 Act § 2001(b)(1).

[44] Ignoring the allowable exemptions, a taxable gift of $250,000 would have required a gift tax of $49,275 under prior law. I.R.C. § 2502 (1954) (amended 1976). Under the Tax Reform Act of 1976, a taxable transfer of $250,000, ignoring the credit, would invoke a unified transfer tax of $65,700. 1976 Act § 2001(b)(1) (amending I.R.C. § 2502 (1954)).

[45] *See* Tax Research Institute of America, The R.I.A. Complete Analysis of the 1976 Tax Reform Law 101 (1976), which contains the following table:

TAXABLE AMOUNT

From	To	Pre-1977 Estate Tax	1976 Act
$ 0	$ 5,000	3%	18%
$ 5,000	$10,000	7%	18%
$10,000	$20,000	11%	20%
$20,000	$30,000	14%	22%
$30,000	$40,000	18%	22%
$40,000	$50,000	22%	24%
****	****	**	**
$7 million	$8 million	73%	70%
$8 million	$10 million	76%	70%
$10 million	——	77%	70%

[46] A taxable estate of $50,000, taxed at a rate of 22% under prior law, is taxed at a rate of 24% under the new law. However, a taxable estate of $8 million, taxed at a rate of 76% under the old law, is now taxed at a rate of 70%. See 1976 Act § 2001(a)(1) (amending I.R.C. § 2001 (1954)).

payable under prior law. Thus, the amount of transfer tax payable on inter vivos transfers for a current calendar quarter[47] is computed in accordance with the following procedure: (1) determine the cumulative total of all taxable gifts[48] made in prior taxable years and prior calendar quarters of the current year; (2) add to this amount the total taxable transfers for the current calendar quarter; (3) utilizing the unified rate schedule, compute a tentative tax on the total amount obtained in step (2);[49] and (4) subtract from the tentative tax determined in step (3) all tax payable on taxable gifts made in prior taxable years and prior calendar quarters.[50] The excess amount represents the transfer tax due on all current transfers.[51]

The new law extends this cumulative method of taxation whereby prior taxable transfers are utilized to determine the taxable rates for current transfers to testamentary transfers. Thus, steps similar to those taken in the context of inter vivos transfers must be taken to compute the transfer tax payable on estates: (1) determine the amount of the taxable estate, as under prior law;[52] (2) add to the amount of taxable estate the amount of all adjusted taxable gifts[53] (taxable gifts made after December 31, 1976);[54] (3) compute a tentative tax on the total obtained in step (2);[55] and (4) subtract from this tentative tax all tax payable on lifetime gifts made after December 31, 1976.[56] The excess constitutes the tax due on the estate.[57] It is clear, therefore, that taxable transfers made during the decedent taxpayer's lifetime accelerate the taxable estate into higher tax brackets.

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[47] *See* text accompanying notes 90 & 91 *infra*.

[48] The question of a "taxable gift" is determined under the new law by resort to the same criteria followed under prior law. As defined by the Treasury Regulations, the term "taxable gifts" encompasses the " 'total amount of gifts' made by the donor during the calendar year less the deductions provided for in sections 2521, 2522, and 2523." Treas. Reg. § 25.2503. However, the $30,000 lifetime specific exemption under I.R.C. § 2521 (1954) is no longer available. I.R.C. § 2521 (1954) (repealed 1976).

[49] *See* 1976 Act § 2001(b)(1) (amending I.R.C. § 2502 (1954)).

[50] The amount of the subtraction will not necessarily equal the gift tax actually paid. For example, if a taxpayer erroneously claimed an exclusion against a prior taxable gift and the statute of limitations has expired on that gift, the taxpayer will still subtract the amount of the gift tax that was due under a correct calculation of the tax liability. *See* Commissioner v. Disston, 325 U.S. 442, 449 (1945).

[51] This computation is made without regard to the unified credit provisions of I.R.C. § 2010. *See* 1976 Act § 2001(b)(1) (amending I.R.C. § 2502 (1954)); 1976 H.R. Rep., *supra* note 14, at 13.

[52] I.R.C. § 2051 controls the determination of the taxable estate. *See* note 33 *supra*.

[53] The "adjusted taxable gifts" will not include gifts that are includable in the decedent's gross estate such as gifts made within three years of death. This rule should avoid the problem of double inclusion of the same property interest when computing the estate's tax liability. 1976 Act § 2001(a)(1)(b) (amending I.R.C. § 2001 (1954)).

[54] Gifts completed prior to the effective date of the estate and gift tax provisions of the Act will not enter into this computation. *Id.*

[55] *See* 1976 Act § 2001(a)(1)(c) (amending I.R.C. § 2001 (1954)).

[56] The decedent may also deduct gift tax paid by his spouse if the decedent transferred property which, for gift tax purposes, was treated as if made by the donor's spouse and that gift is includable in the gross estate of the donor, *e.g.*, gifts made within three years of death. 1976 Act § 2001(a)(1)(d) (amending I.R.C. § 2001 (1954)).

One subsidiary result of the unified method of taxation is the elimination of the estate tax credit for gift tax paid[58] on transfers made after December 31, 1976. The credit will continue only with respect to gifts completed before that date which are also includable in the gross estate.[59] For transfers made after that date, the credit is superfluous since, as illustrated above, all lifetime transfers after December 31, 1976, are added back into the taxable estate to determine the appropriate taxable rate and the taxes payable on such lifetime transfers will be deducted from the tentative tax computation.

C. *The Unified Tax Credit*

All taxpayers formerly could claim the benefits of a lifetime specific exemption of $30,000 for gift tax purposes[60] and an additional estate tax exemption of $60,000.[61] These exemptions have been eliminated by the new law and replaced by a single unified tax credit.[62] The credit is significant for several reasons: (1) Congress rejected the idea of increasing the existing exemptions and chose instead to utilize a tax credit;[63] (2) the tax credit is available to offset the tax payable on either lifetime or testamentary transfers; and (3) the tax credit, when converted to an equivalent exemption, permits a significant amount of property to pass free of transfer taxes.

Early proposals for estate tax reform sought a larger estate tax exemption[64] on the basis of the inflationary economic trends occurring since adoption of the $60,000 exemption.[65] Although most members of Congress apparently agreed that persons of moderate means were being subjected to a significant amount of estate tax,[66] the increased exemption was rejected as the proper avenue of relief.[67] Instead, Congress chose to adopt the unified tax credit as a means of conferring greater benefits on the small and moderately sized estates.[68] Since a tax credit represents a dollar-for-dollar reduction of the tax otherwise due on the transfer in question,[69] these benefits accrue from the fact that the credit has the effect of removing property from the lowest tax brackets. On the other hand, a tax exemption effectively removes property from the highest tax brackets.[70] For example, a tax credit of $30,000 under the new law is roughly equivalent to an exemption of $120,000.[71] On a taxable estate of $250,000, the potential estate tax liability is $70,800.[72] After utilizing

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[57] The unified credit of $47,000 granted by section 2001(d)(1) of the Act may be used to offset this tax. I.R.C. § 2010. The unified credit will be phased-in over the next five years. *Id.* §§ 2010(b), 2505(b).

[58] Sections 2012(a)-2012(d) (amended 1976) allowed a credit for gift tax paid on the gift which, at the time of the donor's death, was required to be included in the value of the gross estate.

[59] I.R.C. § 2010(e).

[60] *Id.* § 2521 (repealed 1976).

[61] *Id.* § 2052 (repealed 1976).

[62] *Id.* §§ 2010, 2505.

[63] In justifying the change from an exemption to a credit, the House Report on H.R. 14844 stated:

> [A]t a given level of revenue cost, a tax credit tends to confer more tax savings on small and medium-sized estates, whereas a deduction or exemption tends to confer more savings on larger estates. Your committee believes it would be more equitable if the exemption were replaced with a credit.

1976 H.R. REP., *supra* note 14, at 15. *See also* 1976 S. REP., *supra* note 1, at 13.

[64] President Ford's estate and gift tax reform proposals would have increased the specific estate tax exemption from its present $60,000 to $150,000 over a five year period. 112 CONG. REC. H10,266 (daily ed. Sept. 16, 1976). Senator Birch Bayh proposed a similar amendment, The Family Farm Inheritance Act, which would have exempted the first

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$200,000 in the value of a family farm from the taxable estate. This proposal was also defeated. 122 CONG. REC. S7805 (daily ed. May 24, 1976).

[65] The pre-1977 federal estate exemption of $60,000 per estate, I.R.C. § 2052 (1954) (repealed 1976), was originally enacted in 1942, Act of Oct. 21, 1942, ch. 619, § 414(a), 56 Stat. 951. While the amount of the exemption has not changed since 1942, the cost of living index has increased 249% since that time. In other words, the purchasing power of the dollar has decreased to less than one-third of its 1942 value. *See* 122 CONG. REC. H10,267 (daily ed. Sept. 16, 1976) (remarks of Congressman Vanik); 1976 H.R. REP., *supra* note 14, at 15.

[66] *See generally* H.R. REP., *supra* note 14, at 5-6; 112 CONG. REC. H10,263-H10,275 (daily ed. Sept. 16, 1976).

[67] *See* note 63 *supra*.

[68]
> As a practical matter, the gift tax exemption is not available to individuals who cannot afford to make lifetime transfers. Thus, the overall transfer tax exemption is effectively greater for individuals who are financially able to utilize the gift tax exemption through lifetime transfers. Your committee believes that it would be more equitable if a unified credit in lieu of an exemption were available on an equal basis without regard to whether the transfers are made only at death or are made both during lifetime and at death.

1976 H.R. REP., *supra* note 14, at 16.

[69] *See* A. KRAGEN & J. MCKNULTY, FEDERAL INCOME TAXATION 10 (2d ed. 1974). Credits are substantially different from exemptions and deductions in that they are subtracted from ascertained tax liability. Assume, for example, that Mr. Jones practices law and has business expenses of $10,000 which are deductible from his gross income. After expenses, he has an adjusted gross income of $40,000 and, after taking allowable deductions, a net income of $35,000. Assuming Mr. Jones is married and has two minor children, he is entitled to personal deductions of $3,000. On this basis, Mr. Jones' taxable income is $32,000 and his tax liability would be $8,660. Assuming he has credits of $1,000 so that his net tax payable would be $7,660, a tax credit is worth much more to Mr. Jones than a deduction or exemption of the same amount. If he is a 50% bracket taxpayer, a $1,000 deduction is worth only $500 in tax saved to him. A $1,000 credit, however, is worth the full $1,000. *Id.*

[70] *Id.*

[71] Computed exactly, the equivalent exemption would be $120,667. *See* I.R.C. §§ 2010(b), 2505(b); 1976 H.R. REP., *supra* note 14, at 16; 122 CONG. REC. H10,266 (daily ed. Sept. 16, 1976) (remarks of Congressman Schneebeli).

[72] 1976 Act § 2001(a)(1) (amending I.R.C. § 2001 (1954)).

the $30,000 tax credit, the estate tax liability is reduced to $40,800.[73] If Congress had instead employed an increased exemption equivalency, the taxable estate would be reduced to approximately $130,000, on which a tax of approximately $32,000 would be payable.[74] The equivalent exemption would thus have produced a greater tax benefit[75] in the case of larger estates.

The tax credit and its concomitant tax benefits will be phased in over a period of five years, as follows:[76]

Year	Tax Credit
1977	$30,000
1978	34,000
1979	38,000
1980	42,500
1981	47,000

Conversion of these credit amounts to equivalent exemptions illustrates that much larger amounts of property will now be passing free of all transfer taxes:[77]

Year	Equivalent Exemption
1977	$120,667
1978	134,000
1979	147,333
1980	161,563
1981	175,625

One of the most important features of the unified credit is its availability for use in offsetting tax due on either lifetime or testamentary transfers.[78] However, only one credit is provided under the new system so that if the credit is fully claimed against lifetime transfers, none will be available to offset estate taxes due. And, if the credit is partially used during the decedent taxpayer's lifetime, only the excess credit will be available at death.[79] Further, official explanations of the new credit indicate that it is mandatory that the credit be used in the order of time that the transfers would be taxable.[80]

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[73] I.R.C. § 2010. The tax credit of $30,000 is the credit available in 1977 under the five-year phase-in rule. *Id.* § 2010(b).

[74] *See* 1976 Act § 2001(a)(1) (amending I.R.C. § 2001 (1954)).

[75] When the credit under I.R.C. § 2010 is fully utilized, the lowest marginal rate at which tax liability is incurred in 1977 is 30%. In 1978, the lowest marginal rate will be 32%. 1976 H.R. REP., *supra* note 14, at 16.

[76] I.R.C. §§ 2010(b), 2505(b). *See also* 1975 H.R. REP., *supra* note 14, at 16; 122 CONG. REC. H10,266 (daily ed. Sept. 16, 1976) (remarks of Congressman Schneebeli). It should be noted that Congressman Schneebeli's statements with respect to the five-year phase-in are somewhat inaccurate.

[77] 1976 H.R. REP., *supra* note 14, at 16.

[78] I.R.C. §§ 2010, 2505.

Under the unified tax credit scheme, several transitional rules apply to certain transfers made during 1976 and 1977. Since the unified credit is applicable only to gifts made after December 31, 1976, and to estates of decedents dying after December 31, 1976,[81] a taxpayer may still claim the $30,000 gift tax exemption for 1976 transfers.[82] If the taxpayer claims the exemption for transfers made after September 8, 1976, however, he must reduce his unified credit by 20% of the amount of the exemption claimed during that period.[83] For example, if the taxpayer claimed the entire $30,000 exemption during that period, his unified credit would be reduced by $6,000. No reduction in the amount of credit available is made for utilization of the specific exemption for transfers made before September 8, 1976. In addition, the 1977 tax credit of $30,000 is phased in, for gift tax purposes, in two stages. Between January 1, 1977, and June 30, 1977, a taxpayer may claim only $6,000 of the available credit against his gift tax liability.[84] After June

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[79] I.R.C. §§ 2010, 2505(a)(2); 1976 H.R. Rep., *supra* note 14, at 16. For example, the estate of a decedent who dies in 1981 may claim a credit of $47,000. If the decedent utilized $30,000 of this credit during his lifetime to offset gift tax liability, only $17,000 will be available to offset the estate tax liability.

[80] Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1976, 94th Cong., 2d Sess. 531 (1976) [hereinafter cited as Joint Comm. on Taxation].

[81] I.R.C. §§ 2010, 2505.

[82] I.R.C. § 2521 (1954) (repealed 1976).

[83] The original House proposal, H.R. 14844, 94th Cong., 2d Sess. (1976), would have reduced the unified credit by an amount equal to 20% of the amount allowed as a specific exemption in computing taxable gifts under I.R.C. § 2521 (1954) (repealed 1976). Thus, where a donor had previously benefited from the full use of the $30,000 gift tax specific exemption under prior law, his new maximum unified credit would be reduced by $6,000. This original proposal seemingly would have made the new unified credit equally beneficial to all. The final provision for reduction of the unified credit by only 20% of the specific exemption used between September 8, 1976, and December 31, 1976, however, would seem to give the greatest benefit to the wealthy, who presumably would already have gotten the full benefit of their $30,000 specific gift tax exemption. Under the new Act, these people may start making tax-free gifts at the same level as those who had not made any tax-free gifts. *See* 1976 H.R. Rep., *supra* note 14, at 16.

[84] I.R.C. § 2505(b). This $6,000 credit will be roughly equivalent to a $30,000 exemption for a donor who previously has made no taxable gifts, but will be less for a donor who has made taxable gifts before 1977 because the latter will already be in a higher gift tax bracket. The $6,000 credit limit does not apply to estates. Indeed, if a taxpayer dies between December 31, 1976, and July 1, 1977, his estate will be entitled to the full $30,000 unified credit. The $6,000 credit limit is reduced by 20% of the pre-1977 specific gift tax exemption, I.R.C. § 2521 (1954) (repealed 1976), used between September 8, 1976, and

30, 1977, and before January 1, 1978, a taxpayer may use the full $30,000 credit.[85]

One of the collateral results of the new tax credit is an adjustment in the various estate filing requirements. Under prior law, an estate tax return was required if the value of the gross estate exceeded $60,000.[86] In line with the new tax credit and its exemption equivalent, the levels at which estates must file a return have been raised in accordance with the following schedule:[87]

Year of Death	Return Required When Gross Estate Exceeds
1977	$120,000
1978	134,000
1979	147,000
1980	161,000
1981 (and thereafter)	175,000

Of course, due to the new unified transfer system, the amounts denoted above must be reduced by the adjusted taxable gifts[88] and the amount of the specific exemption claimed after September 8, 1976, and before 1977.[89] Also, the Tax Reform Act returns to an annual filing system for taxable gifts.[90] Quarterly returns, however, are required when total taxable gifts for the present calendar quarter and all prior unreported quarters of the same calendar year exceed $25,000.[91]

D. *The Unified System in Operation*

To understand fully the operational rules of the unified rate schedule and the unified tax credit, three examples which involve important factual distinctions are instructive. The first hypothetical situation focuses on the estate of a decedent who made no taxable transfers during his lifetime. The second considers the added factor of taxable transfers during the taxpayer's lifetime where the total of such transfers is less

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December 31, 1976. Thus, a donor who had fully utilized the pre-1977 $30,000 exemption during that time will be entitled to no additional credit for the first two quarters of 1977.

[85] I.R.C. § 2505(b).

[86] I.R.C. § 6018(a) (1954) (amended 1976).

[87] 1976 Act § 2001(c)(1)(J)(iii) (amending I.R.C. § 6018(a)(3) (1954)).

[88] I.R.C. § 6018 (a)(4)(A).

[89] *Id.* § 6018(a)(4)(B).

[90] 1976 Act § 2008(b) (amending I.R.C. § 6075(b)(1) (1954)).

[91] 1976 Act § 2008(b) (amending I.R.C. § 6075(b)(2) (1954)).

than the exemption equivalent of the unified tax credit. In the final illustration, the total taxable transfers during the taxpayer's lifetime exceed the equivalent exemption.

Assume that the decedent dies in 1981 leaving a taxable estate of $500,000 and having made no taxable transfers before his death. The potential estate tax liability for the estate would be determined by computing the tax imposed by the unified rate schedule[92] on total transfers of $500,000. Thus, the tax liability before credits would amount to $155,800.[93] Against this potential tax liability, the estate would apply the unified credit of $47,000,[94] yielding a tax payable on the estate of $108,000.[95]

If a decedent has made testamentary and lifetime transfers *not* in excess of the exemption equivalent to the unified credit, the tax liability will be different. Assume that the decedent in the above example dies in 1986[96] having made a taxable transfer of $100,000 in 1981. Computed under the unified rate schedule, the decedent's potential tax liability on the lifetime gift would be $23,800.[97] By claiming $23,800 of his tax credit,[98] this tax liability would be reduced to zero. The tentative tax liability of the estate is computed by first adding to the taxable estate the amount of adjusted taxable gifts,[99] *i.e.* taxable gifts made after December 31, 1976. The unified rates are then utilized to compute a tentative tax on total transfers of $600,000.[100] Thus computed, the tentative tax liability of the estate is $192,700. This liability, however, is reduced by the amount of the unified tax credit,[101] $47,000, leaving a tax payable of $145,700.

If the decedent has made testamentary transfers and lifetime transfers which *exceed* the exemption equivalent to the unified tax credit, still another result will ensue. Assume that the decedent in the above example made an additional gift of $100,000 in 1982. The decedent's potential tax liability on the second gift would be computed by adding to the 1982 gift the amount of total taxable transfers from previous calendar quarters and years.[102] A tentative tax liability would then be computed on cumulative transfers of $200,000. From the tentative tax liability of $54,800 so computed,[103] the tax credit of $47,000 is subtracted,[104] leaving a tax payable on the 1982 gift of $7,800. In this context, however, computation of the estate tax liability is more complicated. First, the adjusted taxable gifts, *i.e.* taxable gifts made after December 31, 1976, are added to the taxable estate, and a tentative tax is computed on cumulative transfers of $700,000. Against this potential tax liability, the estate offsets the gift tax payable by the decedent on gifts made after December 31, 1976,[105] or $7,800. Additionally, the tentative tax is further reduced by the amount of the unified tax credit, or $47,000.[106] Consequently, the total tax payable by the estate equals $175,000.[107]

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[92] 1976 Act § 2001(a)(1) (amending I.R.C. § 2001(c) (1954)).

[93] *Id.*

[94] I.R.C. § 2010.

[95] 1976 Act § 2001(a)(1) (amending I.R.C. § 2001(c) (1954)).

[96] This date is used to avoid consideration of transfers made within three years of death. See section III. *infra.*

[97] 1976 Act § 2001(b)(1) (amending I.R.C. § 2502 (1954)).

[98] I.R.C. § 2505.

[99] 1976 Act § 2001(a)(1) (amending I.R.C. § 2001(b) (1954)).

[100] 1976 Act § 2001(a)(1) (amending I.R.C. § 2001(c) (1954)).

[101] I.R.C. § 2010.

[102] 1976 Act § 2001(b)(1) (amending I.R.C. § 2502(a) (1954)).

E. The Problem of Split Gifts

The gift tax laws have for many years afforded married persons the privilege of splitting gifts.[108] For gift tax purposes, this arrangement permits such persons to treat one-half of any gift transferred by one spouse to a third party as if it had been made by the other spouse.[109] In effect, the concept of split gifts enables the spouse actually transferring the property both to double his annual gift tax exclusion and to lower the tax payable on the taxable portion of the gifts.[110] This latter benefit stems from the fact that half of each such gift is taxed to each spouse, thereby utilizing two progressive rate schedules instead of one.[111]

Unfortunately, the relationship of this gift-splitting device to the unified transfer system, whereby all lifetime gifts made by a decedent are taken into account in determining the taxable rate applicable to the decedent's estate, is somewhat unclear. The new system adds to the taxable estate the adjusted taxable gifts, *i.e.* gifts made after December

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[103] *Id.*

[104] I.R.C. § 2505.

[105] 1976 Act § 2001(a)(1) (amending I.R.C. § 2001(b)(2) (1954)). See note 48 *supra.*

[106] I.R.C. § 2010.

[107] 1976 Act § 2001(a)(1) (amending I.R.C. § 2001 (1954)).

[108] *See* I.R.C. § 2513.

[109] I.R.C. § 2512. This provision, however, is not automatic or mandatory but must be elected by the taxpayer.

[110] Each spouse will be permitted to claim his annual gift tax exemption as to one-half of the gift, and each will be taxed according to his own rate schedule. Nevertheless, each is considered jointly and severally liable for the entire amount of the tax due. I.R.C. § 2513(d).

[111] For example, assume that a husband makes a gift of $26,000 to his son. If one ignores the specific exemptions of prior law and the unified credit of present law, and if both spouses so elect, they will each be treated for tax purposes as having made a gift of $13,000. *Id.* § 2513. After claiming the annual gift tax exclusions, gift tax will be imposed on a gift of $10,000 for each spouse. *Id.* § 2503(b). Under the new rate schedule, a tax of $1,800 will be due on each taxable gift for a total tax liability of $3,600. The tax on one $20,000 gift, however, would be $3800. 1976 Act § 2001(b)(1) (amending I.R.C. § 2502 (1954)).

31, 1976, and not includable in the decedent's estate, on which a tentative tax liability is computed.[112] If a decedent availed himself of the gift-splitting device and thereby treated half of his gifts as if made by his spouse, the term "adjusted taxable gifts," as applicable to his estate, is susceptible to two possible interpretations.[113] The exact parameters of the term will ultimately depend upon whether reliance is placed upon estate or gift tax law. For estate tax purposes, a split gift traditionally has been treated as if made totally by the spouse who actually transferred the property.[114] If interpreted in this context, the term may include the total taxable gifts actually transferred by the decedent. In the alternative, the term may encompass only the amount of the gifts (one-half) treated as if they had been made by the decedent for gift tax purposes.[115] The distinction is crucial since a lower tax liability will accrue under the latter interpretation.[116]

At least two arguments militate in favor of interpreting "adjusted taxable gifts" to include only one-half of all lifetime gifts in computing the tax liability of the estate. Newly-revised section 2001, which imposes a tentative tax on the taxable estate augmented by the adjusted taxable gifts, defines the term by incorporating the definition of "taxable gifts" denominated in the gift tax chapter of the Code.[117] This specific reference to the gift tax definition of taxable gifts negates the idea that the normal estate tax rule is applicable to the situation in question.[118] In addition, the purpose behind the gift-splitting option would effectively be annulled by including the total amount of such gifts in the transferor's estate. Gift-splitting was introduced to equalize the tax treatment of residents of common law states and those of community property states.[119] Since spouses living in community property states are generally treated as if each owns one-half of all property acquired during the marriage,[120] each spouse ordinarily is taxed on one-half the value of a gift of community property. To include in "adjusted taxable gifts" the total gifts transferred by a decedent would allow transfers attributed to the other spouse to increase the taxable rate applicable to the decedent's estate and thereby eliminate the opportunity to engage two rate schedules in taxing such gifts.[121] As a result, the laudable goal of affording equal estate tax advantages to spouses living in common law and community property states would remain unattained.

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[112] 1976 Act § 2001(a)(1) (amending I.R.C. § 2001 (1954)).

[113] This proposition, however, is not applicable to transfers made within three years of death since these items will be includable in the estate, and the Code definition of "adjusted taxable gift" excludes gifts that are includable in the gross estate. 1976 Act § 2001(a)(5) (amending I.R.C. § 2035 (1954)); 1976 Act § 2001(a)(1) (amending I.R.C. § 2001(b) (1954)).

[114] Rev. Rul. 54-246, 1954-1 C.B. 179.

[115] 1976 Act § 2001(a)(1) (amending I.R.C. § 2001 (1954)).

[116] See notes 119 through 121 and accompanying text *infra*.

[117] 1976 Act § 2001(a)(1) (amending I.R.C. § 2001 (1954)), incorporates the definition found in I.R.C. § 2503(a). The imposition of a gift tax ultimately depends upon whether a gift has been made within the meaning of the gift tax chapter of the Code. Section 2513 states that a split gift, for purposes of the gift tax chapter, is a gift one-half of which was made by each spouse. I.R.C. § 2513.

[118] Section 2035 of the estate tax laws places back in the estate all gifts made within three years of the decedent's death. This section makes no reference to the gift tax definition of "gifts" and, therefore, requires in the case of split-gifts that all property actually transferred by the decedent be placed back in the estate regardless of the gift tax treatment. *See* I.R.C. § 2035. See section III. *D*, *infra*.

[119] C. Lowndes, R. Kramer & J. McCord, Federal Estate and Gift Taxes 862 (3d ed. 1974).

II. INCREASED MARITAL DEDUCTIONS AND QUALIFIED JOINT INTERESTS

Proponents of tax-free transfers between husband and wife sought relief from the 94th Congress through proposals which would have allowed unlimited estate and gift tax marital deductions[122] and recognized household services as a contribution in the acquisition of joint property.[123] Though neither concept gained full acceptance, Congress did pass three compromise measures which give limited relief in this area. To permit freer transferability of property between spouses, Congress adopted a new alternative marital deduction for estates whereby any decedent may leave his surviving spouse an amount not in excess of $250,000[124] free of federal estate tax.[125] In addition, a revised gift tax marital deduction designed to encourage lifetime transfers between spouses fully exempts from taxation cumulative transfers not exceeding $100,000.[126] In the area of joint property, spouses may avoid full inclusion of certain joint property interests in the estate of one spouse[127] if the creation of the joint interest was treated as a gift for tax purposes.[128]

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[120] This, of course, is an oversimplification. For a more in-depth discussion of community property concepts, see 4A J. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY 310-73 (1961); *see* 1976 H.R. REP., *supra* note 14, at 17 n.1.

[121] For example, suppose a husband makes a taxable gift of $50,000, electing the gift-splitting provisions of I.R.C. § 2513. The husband dies five years later leaving a taxable estate of $200,000. If the amount of the entire gift is added to his estate, a tentative estate tax liability of $70,800 accrues. 1976 Act § 2001(a)(1) (amending I.R.C. § 2001(c) (1954)). If only his half of the gift, $25,000, is added to the estate, the tentative tax liability is $62,800. *Id.* Of course, gift tax payable on lifetime gifts offsets tax liability in both examples.

[122] President Ford's proposal for estate and gift tax changes would have provided for an unlimited marital deduction allowing husbands and wives to transfer their property to their spouses with no estate or gift tax liability. 122 CONG. REC. H10,267 (daily ed. Sept. 16, 1976).

[123] *See id.* at H10,268-H10,269 (remarks of Congresswoman Keys). For a discussion of the tax problems inherent in the treatment of a homemaker's services as a contribution to jointly-held property, see Comment, *Estate Tax Section* 2040: *Homemaker's Contribution to Jointly Owned Property*, 29 TAX LAW. 623 (1976).

[124] 1976 Act § 2002(a) (amending I.R.C. § 2056(c) (1954)).

[125] *Id.*; *see* 1976 H.R. REP., *supra* note 14, at 18. Property with a fair market value not in excess of $250,000 will qualify for this marital deduction.

[126] *See* 1976 Act § 2002(b) (amending I.R.C. § 2523(a) (2) (1954)).

A. *The Alternative Marital Deduction for Estates*

The Tax Reform Act of 1976 continues the marital provision of prior law which allows a decedent to leave his surviving spouse an amount equal to one-half of his adjusted gross estate[129] free of federal estate tax.[130] Congressional sentiment, however, supported the idea of permitting a decedent to pass an even greater portion of his estate to his surviving spouse with little or no estate taxation.[131] Attempting to balance this concept against the Act's overall purpose of alleviating the estate tax burden on small and moderately sized estates,[132] Congress adopted the alternative estate tax marital deduction, which fully exempts a marital bequest totalling $250,000 or less from all federal estate tax.[133] This new marital provision offers estates a choice between the standard "maximum marital deduction" of one-half of the adjusted gross estate[134] and the alternative "maximum marital deduction" of $250,000.[135] For an adjusted gross estate having a value in excess of $500,000, the standard marital provision will continue to yield the largest deduction[136] and, therefore, the greatest tax benefit. However, where the value of the adjusted gross estate is less than $500,000, the larger marital deduction will accrue from utilizing the alternative marital deduction.[137] For example, the marital deduction for an adjusted gross estate of $400,000 would be $200,000[138] under the standard marital deduction and $250,000 under the new alternative deduction.[139] Obviously, the latter provision produces the greater tax benefit for the $400,000 estate.[140]

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[127] Under the provisions of I.R.C. § 2040 (1954) (amended 1976), a decedent's gross estate included the value of property held jointly by the decedent and other persons at the time of the decedent's death with the right of survivorship. The value of property attributable to the amount of consideration furnished by the other joint owner or owners, however, was not included in the estate. Under this section, there was a rebuttable presumption that all consideration for jointly held property had originated with the joint owner who died first. The burden placed upon the survivors to rebut the presumption was satisfied only by the ability to specifically trace the exact origin of the consideration used to purchase the property. This requirement placed an almost insurmountable burden upon the surviving spouse of a couple who kept their funds in a joint savings account and used such mingled funds to purchase jointly held property. *See, e.g.,* McGrew's Estate v. Commissioner, 135 F.2d 158, 162 (6th Cir. 1943). Further, the presumption was raised even if the couple, at the time of the creation of the joint interest with right of survivorship, had elected to treat one-half of the property as a gift from the purchasing spouse to the other and paid gift tax thereon. Although there was at the time of the death of the purchasing party a credit for the gift tax previously paid, an election to treat the creation of such interest as a gift between spouses was essentially an exercise in futility. *See* Foster v. Commissioner, 90 F.2d 486, 488 (9th Cir. 1937), *aff'd per curiam,* 303 U.S. 618 (1938); Treas. Reg. § 20-2040-1 (1972); 1976 H.R. REP., *supra* note 14, at 19.

[128] 1976 Act § 2002(c)(3) (amending I.R.C. § 2040 (1954)).

[129] The "adjusted gross estate" is defined by I.R.C. § 2056(c)(2) as the value of the gross estate less the aggregate amount of deductions allowed by section 2053 (*e.g.* expenses, indebtedness) and section 2054 (losses). Section 2031(a) defines the term "gross estate" to include the value of all property, real or personal, tangible or intangible, wherever situated that the decedent owned.

[130] Section 2056 provided for a maximum marital deduction of one-half of the decedent's adjusted gross estate. *See* I.R.C. § 2056(c) (1954) (amended 1976).

[131]
> Your committee believes that a decedent with a small or medium-sized estate should be able to leave a minimum amount of property to the surviving spouse without the imposition of an estate tax. Your committee further believes that the present limitation on transfers to a spouse free of gift tax is too restrictive and tends to interfere with normal interspousal lifetime transfers.

1976 H.R. REP., *supra* note 14, at 17; 122 CONG. REC. H10,266-H10,267 (daily ed. Sept. 16, 1976).

[132] *See* note 14 and accompanying text *supra.*

Through the combined use of the unified tax credit and the alternative marital deduction, a much larger estate can now pass free of federal estate taxes.[141] Previously, the specific exemption and maximum marital deduction completely exempted from federal taxation an adjusted gross estate valued at $120,000 or less.[142] By 1981, full utilization of the tax credit and the alternative marital deduction could entirely eliminate federal estate tax problems for estates of $425,625 or less.[143]

From a will-drafting standpoint, estate planners merely seeking to obtain the maximum marital deduction for a given estate may do so by continuing to use a pecuniary formula clause.[144] Under this approach, the surviving spouse will receive an amount equal to the "maximum marital deduction" as that term is defined by the Internal Revenue Code.[145] If preferred, the bequest may be stated alternatively as a gift of an amount equal to the greater of (a) one-half of the adjusted gross estate, or (b) $250,000.[146] The more difficult drafting problems will arise in dealing with those estates in which the estate planner prefers to use the marital deduction only to the extent required to avoid taxation after first exhausting the unified tax credit. Such a planning technique would be particularly appropriate where both spouses have sizeable estates[147] and at least one of those estates does not exceed the sum of the exemption equivalent of the unified credit plus the maximum alternative marital deduction.[148] In this circumstance, the unnecessary accumulation of the surviving spouse's estate and the resultant estate tax problems which will arise upon the survivor's death may be obviated. In the case of an estate that does not exceed $425,624,[149] the estate planner may recommend a marital bequest equal in value to the excess of the taxable estate, computed before subtracting the marital deduction, over the exemption equivalent of the unified credit available to that estate.[150] Such a marital bequest places in the surviving spouse's estate only the amount needed, after fully using the unified credit, to result in the imposition of no federal estate tax on the estate of the deceased spouse.[151] Accordingly, tremendous tax savings will accrue upon the death of the second spouse.[152]

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[133] *See* 1976 Act § 2002(a) (amending I.R.C. § 2056(c) (1954)); 1976 H.R. REP., *supra* note 14, at 18.

[134] 1976 Act § 2002(a) (amending I.R.C. § 2056(c)(1)(A)(iii) (1954)).

[135] 1976 Act § 2002(a) (amending I.R.C. § 2056(c)(1)(A)(i) (1954)).

[136] The standard marital deduction in an adjusted gross estate of $600,000 would be $300,000. 1976 Act § 2002(a) (amending I.R.C. § 2056(c) (1954)).

[137] *Id.* In overall estate planning, use of the alternative marital deduction may not always be advisable. See text accompanying notes 141 through 146 *infra.*

[138] 1976 Act § 2001(a) (amending I.R.C. § 2056(c)(1)(A)(ii) (1954)).

[139] 1976 Act § 2002(a) (amending I.R.C. § 2056(c)(1)(A)(i) (1954)).

[140] For a consideration of the tax impact on the estate of the survivor, see text accompanying notes 147 through 152 *infra.*

[141] For detailed computations which take account of the gift tax marital deduction, see Capouano & Rinsky, *Planning Gifts to a Spouse to Obtain Maximum Tax Benefits Under the New Law*, 46 J. TAX. 73 (1977).

[142] I.R.C. §§ 2052, 2056 (1954) (amended 1976). This does not take account of any charitable deductions under I.R.C. § 2055.

[143] *Id.* § 2010; 1976 Act § 2002(a) (amending I.R.C. § 2056(c)(1)(A)(i) (1954)). This does not take the charitable deduction into account. *See* I.R.C. § 2055 (1954) (amended 1976); I.R.C. § 2057.

[144] A formula pecuniary gift is a gift to a surviving spouse of an amount equal to the maximum marital deduction to which the estate is entitled, less the value of any other interests passing to the surviving spouse that qualify for the marital deduction. It is, in other words, the gift of an amount which will equal the maximum marital deduction to which the estate is entitled when added to the other interests that pass to the surviving spouse apart from the

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formula gift and qualify for the marital deduction.

C. Lowndes, R. Kramer & J. McCord, *supra* note 119, at 945.

[145] 1976 Act § 2002(a) (amending I.R.C. § 2056(c) (1954)).

[146] *Id.*; *see* 1976 H.R. Rep., *supra* note 14, at 18.

[147] Where the combined estates of the spouses do not exceed the exemption equivalent of the unified tax credit, there will be no tax at the death of either spouse even where the first spouse to die leaves all to the other. Consequently, this technique could be inappropriate. It also will be inappropriate when the needs of the surviving spouse warrant additional funds to provide adequate financial security.

[148] If both estates exceed this sum, full use of the maximum marital deduction will generally be required to achieve the maximum tax savings.

[149] This is the maximum size estate for which this planning technique would be beneficial, based upon the unified tax credit of 1981. In 1977, the amount would be $370,666. This figure is attained by adding to the exemption equivalent of the unified tax credit the amount of the alternative marital deduction less one dollar. *See* 1976 Act § 2002(a) (amending I.R.C. § 2056(c) (1954)); I.R.C. § 2010.

[150] Until the Internal Revenue Service issues a ruling or regulation concerning clauses of this type, the authors do not wish to recommend any particular language for achieving this result.

[151] Assume, for example, that each spouse has an adjusted gross estate of $300,000. By using such a bequest in the husband's estate, only $125,000 would pass to the wife at his death. The husband's estate would not be subject to federal estate tax even though it has not taken full advantage of the maximum marital deduction of $250,000. The estate has simply used its tax credit first to avoid any build-up of the wife's estate.

[152] Based upon the example in note 151 *supra*, the tax savings would be as follows:

(1) *Use of the maximum marital deduction before using the tax credit*: At the

Many wills now require revision in light of the particular taxpayer's objectives with respect to the marital deduction.[153] In addition, wills utilizing a pecuniary formula clause for the marital bequest to pass an amount equal to the "maximum marital deduction" to the surviving spouse must be revised if the testator wishes to avail himself of the new alternative marital deduction. This requirement is the immediate result of a transitional rule stating that such marital deduction clauses will be interpreted under pre-1977 law if the testator dies before 1979 without having reexecuted or republished his will after December 31, 1976.[154] The rule does, however, permit application of the new law to such clauses, even though not reexecuted, if such an application is permitted by state law.[155]

B. *The Increased Gift Tax Marital Deduction and Its Impact on the Estate Tax Marital Deduction*

Although heralded as a new estate planning tool for shifting property from the spouse having the larger estate,[156] the new gift tax marital deduction contains some pitfalls for the unwary. This new provision, applicable to transfers made after December 31, 1976, introduces a three-tier system for taxing inter vivos gifts between spouses and a new

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husband's death, the estate tax liability will be zero since the taxable estate is $50,000 ($300,000 minus the $250,000 alternative maximum marital deduction), on which an estate tax of $9,600 is payable. Application of the unified tax credit to this figure, however, results in no tax liability. Upon the subsequent death of the wife, her estate totals $550,000 (her $300,000 plus marital gift of $250,000), on which an estate tax of $174,300 is payable. The unified tax credit of $47,000 (1981) reduces the tax due to $127,300.

(2) *Use of the marital deduction only after exhausting the tax credit*: At the husband's death, the tax liability of his estate remains zero. However, upon the wife's death, her estate totals only $425,000 (her $300,000 plus the marital gift of $125,000), on which a tax of $130,300 is payable. The tax credit reduces the tax due to $83,300. Accordingly, the tax liability on the death of the second spouse (the wife) has been reduced $34,000 by means of this simple device. 1976 Act § 2001(a)(1) (amending I.R.C. § 2001(c) (1954)). Although the wife receives less in the second situation, she can be granted the use of the non-marital portion of the estate by means of a legal or equitable life estate. *See generally* Capouano & Rinsky, *supra* note 141.

[153] The options available in this area are discussed at text accompanying notes 147 through 152 *supra*.

[154] 1976 H.R. REP., *supra* note 14, at 18. This rule applies to wills executed on or before December 31, 1976. The operation of this transitional rule, however, could be avoided if a testator's will simply specified a desire to leave at least $250,000 to his spouse. Also, a specific reference to the new law evidencing the testator's intent that the law should apply to his will would suffice to rebut the transitional presumption against such application. [1977] FED. TAXES (Estate & Gift) (P-H) ¶ 120, 560; *see* 1976 Act § 2001(d)(1); 1976 H.R. REP., *supra* note 14, at 18.

[155] 1976 H.R. REP., *supra* note 14, at 18. To date, the Mississippi State Bar Committee on Taxation has not recommended enactment of such a law.

[156] *See* 122 CONG. REC. H10,266 (daily ed. Sept. 16, 1976) (remarks of Congressman Schneebeli). *See generally* Capouano & Rinsky, *supra* note 141.

interdependence between the gift tax marital deduction and the estate tax marital deduction.[157]

Under prior law, the gift tax marital deduction permitted 50% of all gifts between spouses to pass free of gift tax.[158] The Tax Reform Act creates three levels of taxation, each having a different marital deduction. For interspousal gifts totalling $100,000 or less, the gift tax marital deduction equals the amount of the gift and fully exempts such transfers from federal gift taxation.[159] After the amount of such gifts totals $100,000, no gift tax marital deduction is granted until interspousal gifts reach a total of $200,000.[160] Thereafter, all further gifts are subject to a gift tax marital deduction equal to 50% of the gift.[161]

Although Congress adopted the new provisions with the objective of encouraging transfers between spouses,[162] the new law appears to offer little more than a change in the timing of the tax payment.[163] Indeed, if transfers totalling at least $200,000 are made, the amount of the total gift tax marital deduction claimed will remain the same as under prior law. For example, if a husband makes two gifts to his wife, one of $100,000 in 1977 and one of $100,000 in 1978, no gift tax will be payable on the first transfer, but gift tax potentially will be due on the full amount of the second transfer.[164] If these gifts had been made in 1975 and 1976, an amount equal to $50,000 would be subject to gift tax liability in each of those years.[165] In both situations, the amount escaping taxation by means of the gift tax marital deduction is $100,000. However, under the new law, the timing for payment of the tax has effectively been postponed.

The advantages afforded by this system apparently lie in full utilization of the first-tier marital deduction without continuing through the second tier. Thus, the gift tax lost on the first tier will not have been fully recouped.[166] This "lost tax" will be recouped, however, by means of another device—a reduction in the maximum estate tax marital deduction available for certain lifetime transfers.[167] To the extent that a decedent availed himself of a gift tax marital deduction in excess of one-half of the gift, a corresponding reduction must be made in the maximum marital deduction available for his estate.[168] For example, if the first tier is fully utilized, *i.e.* gifts are made totalling $100,000, the taxpayer has obtained a gift tax marital deduction of $100,000 which exceeds 50% of the gift by $50,000.[169] His estate will thus lose $50,000 of its maximum marital deduction. If gifts totalling $150,000 were made, the taxpayer has availed himself of a $100,000 deduction which exceeds one-half of the gift by $25,000. Correspondingly, a reduction of $25,000 will be made in his maximum estate tax marital deduction. However, once lifetime gifts total $200,000, no reduction will be made in the estate's marital deduction.

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[157] 1976 Act § 2002(b) (amending I.R.C. §§ 2056(c)(1)(B), 2523(a) (1954)).

[158] I.R.C. § 2523(a) (1954) (amended 1976).

[159] 1976 Act § 2002(b) (amending I.R.C. § 2523(a)(2)(A) (1954)).

[160] 1976 Act § 2002(b) (amending I.R.C. § 2523(a)(2)(B) (1954)).

[161] *Id.*

[162] *See* 1976 H.R. Rep., *supra* note 14, at 17; 122 Cong. Rec. H10,266 (daily ed. Sept. 16, 1976) (remarks of Congressman Schneebeli).

[163] Despite Representative Al Ullman's remarks that "the bill increases the gift tax marital deduction in the case of lifetime gifts to a spouse," 122 Cong. Rec. H10,277 (daily ed. Sept. 16, 1976), the new provisions appear only to change the time for payment.

[164] 1976 Act § 2002(b) (amending I.R.C. § 2523(a)(2) (1954)). This does not consider the annual gift tax exclusion, I.R.C. § 2503(b), or the unified credit, *id.* § 2505.

[165] *See* I.R.C. § 2523(a)(2) (1954) (amended 1976).

[166] 1976 Act § 2002(b) (amending I.R.C. § 2523(a)(2) (1954)).

[167] 1976 Act § 2002(b) (amending I.R.C. § 2056(c)(1)(B) (1954)).

The interrelationship of the estate and gift tax marital deductions is less clear when considered in combination with the gift tax annual exclusion[170] which survived the Act without amendment. When determining if the gift tax marital deduction claimed during the donor's lifetime exceeds one-half of the interspousal gifts for purposes of reducing the maximum marital deduction available to an estate, it is uncertain whether gifts that were non-taxable due to the application of the annual exclusion enter into the computation. For example, if a husband gives his wife $103,000 in 1977 and $3,000 in each of the next 33 years, all of the gifts will be sheltered from taxation through the combined effect of a marital deduction of $100,000 and annual exclusions totalling $102,000.[171] If the gifts exempted from tax by means of the annual exclusions are ignored for purposes of computing the reduction in the estate tax marital deduction, the husband will be treated as having obtained a gift tax marital deduction exceeding one-half of the gifts of $50,000. Thus, his estate will lose $50,000 of the maximum marital deduction.[172] On the other hand, if all gifts to the spouse enter into the computation, the husband's estate will not lose a portion of its maximum marital deduction since the husband has not availed himself of a gift tax marital deduction in excess of one-half of the gifts. In the above hypothetical, for example, interspousal gifts totalled $202,000 while the marital deduction claimed with respect to those gifts was only $100,000. If this latter treatment is the correct one, interspousal gifts, exempted from tax through application of the annual exclusions, may be a tool for improving the position of the donor spouse with respect to his estate tax marital deduction.[173]

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[168] *Id.*

[169] Again, the example ignores the annual gift tax exclusion provided by I.R.C. § 2503(b).

[170] I.R.C. § 2503(b).

[171] 1976 Act § 2002(b) (amending I.R.C. §§ 2503(b), 2523(a) (1954)).

[172] 1976 Act § 2002(a) (amending I.R.C. § 2056(c)(1)(B) (1954)).

[173] If only the 1977 gift had been made, the taxpayer would have obtained a gift

C. *Special Treatment for Qualified Joint Interests*

Additional tax relief for married persons is provided by long overdue revisions in the estate tax treatment of joint property interests which include survivorship provisions.[174] Despite declarations by Congress to the contrary,[175] these revisions do not make substantial changes in the law concerning joint property interests held by spouses, one of whom contributed only household or other services incapable of exact valuation[176] to the purchase of that property. Instead, the revisions simply eliminate the inequity existing in prior law which often resulted in the imposition of both estate tax and gift tax on the same property interests.[177]

Under the revised provisions, gift tax continues to be imposed upon the creation of joint tenancies and tenancies by the entirety between spouses where one spouse supplies more than his share of the consideration.[178] However, no tax is imposed until the transfer of the joint interest

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tax marital deduction of $100,000. This would exceed one-half of the interspousal gift by $48,500. But for the later gift of $3,000 per year, his estate would have lost $48,500 of the maximum marital deduction.

[174] *See* 1976 Act § 2002(c)(1),(3) (amending I.R.C. § 2040 (1954)). This provision is applicable to joint tenancies providing for a right of survivorship on the part of the last surviving spouse.

[175]
> Much of the tax code's discrimination against women has been alleviated by the committee bill. In the past, there was no way for joint ownership to be recognized for Federal estate tax purposes. This bill provides for joint tenancy. The joint tenancy may be created by a transfer of up to $3,000 annually, which is excluded from gift taxation, or by additional transfers subject to the gift tax. Unlike present law, under the bill this transfered property will be treated as belonging to each spouse. In addition, the bill increases the marital deduction to $250,000 or one-half, whichever is greater. This means that in the smaller estates, where both spouses have equally contributed to the success of the estate, the estate tax law will automatically recognize the contribution of both. These changes are a tremendous step forward in equity for women.

122 CONG. REC. H10,268-H10,269 (daily ed. Sept. 16, 1976)(remarks of Congresswoman Keys). The effect of including only one-half the value of the property in the gross estate is to implicitly recognize the services furnished by a spouse toward the accumulation of the jointly-owned property even though a monetary value of the services cannot accurately be determined. 1976 H.R. REP., *supra* note 14, at 20.

[176] The courts have almost uniformly rejected the treatment of domestic services as consideration for the acquisition of jointly-held property between spouses. Bushman v. United States, 8 F. Supp. 694, 697-98 (Ct. Cl. 1934); Harold Loveland, 13 T.C. 5, 7-8 (1949). However, if the spouse performs services in connection with a family business and the spouses have an agreement for sharing profits, the services may constitute consideration. Berkowitz v. Commissioner, 108 F.2d 319, 321-22 (3d Cir. 1939).

[177] *See* I.R.C. § 2040 (1954), *as amended by* 1976 Act § 2002(c)(1), (3). See text accompanying notes 185 through 189 *infra.*

[178] I.R.C. § 2501. The amount of the gift depends upon the rights of severance provided under local law and the use of actuarial tables to compute the chance of survival. Rev. Rul. 69-505, 1969-2 C.B. 179; *see* Estate of Kohn, 43 Wis. 2d 520, 168 N.W.2d 812, 815 (1969).

is "complete" for gift tax purposes.[179] If the joint tenant supplying the entire consideration for the joint property can reacquire all of that property for his own use, the creation of the joint tenancy does not constitute a completed gift.[180] Joint bank accounts,[181] joint brokerage accounts[182] and jointly held United States savings bonds[183] are typical examples of such incomplete gifts. As a further limitation, the creation of joint tenancies or tenancies by the entirety in real property between spouses is treated as a gift only if the spouses so elect.[184]

Upon the death of a spouse owning joint property, the pre-Act estate tax provisions required inclusion of the value of the entire property, rather than just the decedent's fractional interest in his gross estate.[185] The estate could avoid this total inclusion only by proving contribution by the surviving joint tenant.[186] As a further requirement, the contribution had to be in the form of money or money's worth and could not have originated with the deceased spouse.[187] For married persons, proof of separate contribution was especially difficult, particularly where one spouse was employed in the home or in a family business.[188] In the absence of proof of satisfactory contribution, the rule could thus result in the imposition of both estate and gift taxes on the same property. Such a result, however, would obtain only if the creation of the joint interest was a completed gift or if the spouses made the necessary elections in the case of real property.[189]

Although the credit for gift tax paid corrected this inequity to some extent,[190] the new modifications in the estate tax provisions relative to joint property afford more extensive relief by means of a special rule applicable only to "qualified joint interests."[191] A qualified interest includes property held in joint tenancy or tenancy by the entirety between spouses where the joint interest was created by one or both of them.[192] In the case of personal property, the creation of the joint interest must have been a completed gift for gift tax purposes.[193] For real property, the proper election must have been made by the spouses.[194] Contrary to prior law, the death of a spouse owning such a qualifying interest results in an inclusion of only one-half of the property in the deceased spouse's estate.[195] Joint property interests other than qualifying ones remain subject to the normal rule which taxes such interests fully to the joint tenant dying first in the absence of proof of contribution by surviving joint tenants.[196]

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[179] Treas. Reg. § 25.2511.1(b), (c), (d) (1973).

[180] *Id.* See notes 181 through 184 *infra*.

[181] Treas. Reg. § 25.2511-1(h)(4) (1973).

[182] Rev. Rul. 69-148, 1969-1 C.B. 226.

[183] Rev. Rul. 68-269, 1968-1 C.B. 399.

[184] *See* I.R.C. § 2515.

[185] *Id.* § 2040 (1954) (amended 1976).

[186] *Id.*

[187] *See* Dimock v. Corwin, 306 U.S. 363, 372 (1939); Treas. Reg. § 20.2041-1(c) (1954).

[188] *See* Comment, *supra* note 123, at 624-25.

[189] I.R.C. § 2040 (1954) (amended 1976).

[190] *See* 1976 Act § 2001(c)(1)(B) (amending I.R.C. § 2012 (1954)).

[191] 1976 Act § 2002(c)(1), (3) (amending I.R.C. § 2040 (1954)).

[192] I.R.C. § 2040(b)(2).

[193] *Id.*

[194] The election continues to be applicable if improvements are made to the property

III. TRANSFERS WITHIN THREE YEARS OF DEATH AND THE UNIFIED TAX SYSTEM

A. *Elimination of Contemplation of Death and the Substitute Provision*

Closely related to the operation of the unified transfer system is the problem of gifts made by a taxpayer within three years of death. In the absence of evidence to the contrary,[197] pre-1977 law presumed that such transfers were made in contemplation of death and as such were testamentary substitutes includable in the decedent's estate.[198] This treatment could be avoided only by establishing a dominant lifetime motive on the part of the decedent in making the gift. Sufficient lifetime motives were found in the desire to rid oneself of management responsibilities,[199] to avoid income taxes[200] or to enable the donee to attain financial independence.[201] The difficulties encountered by executors and the Internal Revenue Service alike in establishing a decedent's motives and the concomitant litigation[202] led Congress to eliminate the concept of "contemplation of death" from the estate planner's vocabulary.

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or liabilities on the property are discharged. Thus, subsequent gift tax returns will be required if these amounts exceed the annual exclusion. This rule, however, does not apply to appreciation in the property. 1976 H.R. REP., *supra* note 14, at 21.

[195] *See* 1976 Act § 2002(c)(1), (3) (amending I.R.C. § 2040(b) (1954)).

[196] 1976 Act § 2002(c)(1),(3) (amending I.R.C. § 2040(a) (1954)). Such interests will include incomplete gifts, gifts in which no election was made under I.R.C. § 2515, joint interests not created by the spouses and joint interests not held by the spouses.

[197] The taxpayer was saddled with the burden of establishing that a transfer made within three years of death was not made in "contemplation of death." *See* Dennis v. United States, 18 A.F.T.R.2d 6237-38 (S.D. Cal. 1966); Kruvant v. United States, 12 A.F.T.R.2d 6288-89 (E.D.N.J. 1963); Stiles v. United States, 2 A.F.T.R.2d 6391-94 (W.D. Fla. 1958); Treas. Reg. § 20.2035-1(d) (1958).

[198] See note 197 *supra*.

[199] *E.g.*, Estate of Stinchfield, 161 F.2d 555, 555 (9th Cir. 1947); Austin Nat'l Bank v. Scofield, 84 F. Supp. 483, 485 (W.D. Tex. 1948).

[200] See, *e.g.*, Becker v. St. Louis Union Trust Co., 296 U.S. 48, 52 (1935), *overruled on other grounds*, Helvering v. Hallock, 309 U.S. 122 (1940); Kniskern v. United States, 232 F. Supp. 7, 13 (S.D. Fla. 1964); Lockwood v. United States, 181 F. Supp. 748, 751 (S.D.N.Y. 1959).

[201] *E.g.*, Des Portes v. United States, 171 F. Supp. 598, 600 (E.D.S.C. 1959); State Street Trust Co. v. United States, 160 F. Supp. 877, 879 (D. Mass. 1958), *aff'd on other grounds*, 263 F.2d 635 (1st Cir. 1959).

[202] *See* 1976 H.R. REP., *supra* note 14, at 13.

The Tax Reform Act adopts an absolute three-year rule whereby all transfers made by a decedent within three years of death are includable in his estate.[203] Cognizant that the rebuttable presumption of prior law was introduced in response to a holding by the United States Supreme Court that a conclusive presumption violated due process requirements by creating an unreasonable classification,[204] Congress wisely addressed the constitutionality of the new absolute rule.[205] Alluding to the possibility that the case might be decided differently today,[206] Congress noted that the new rule makes no presumptions and, therefore, makes no attempt to classify transfers as having been made in contemplation of death.[207] The new rule ignores motive and simply taxes all transfers made within three years of death.

The new law creates two exceptions to the general three-year rule. Transfers made for adequate and full consideration in money or money's worth are exempt.[208] Also, for administrative convenience,[209] transfers excludable from taxable gifts through application of the annual gift tax exclusion are also excluded from the rule's operation.[210] However, the amount of the gift includable within the annual exclusion is computed without regard to the gift-splitting provisions of section 2513(a).[211]

B. *Gross-Up of the Estate for Gift Tax Paid*

When property is includable in the estate by virtue of the three-year rule, the amount included in the donor's estate under both the prior law and the new provisions is the value of the transferred property as of the donor's date of death.[212] Under prior law, however, the donor could successfully remove from his estate the gift tax paid on such transfers within three years of death.[213] The Act removes this advantage by requiring an increase in the gross estate in the amount of the transfer taxes paid by the decedent on all gifts made by the decedent or his spouse within three years of the decedent's death.[214] The estate, however, is not increased by gift tax paid by the decedent's spouse on the portion of any gifts made by the decedent within three years of death but attributed to the spouse under the gift-splitting provision.[215]

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[203] 1976 Act § 2001(a)(5) (amending I.R.C. § 2035 (1954)).

[204] *See* Heiner v. Donnan, 285 U.S. 312, 321-22 (1932).

[205] 1976 H.R. REP., *supra* note 14, at 14.

[206] The House Ways and Means Committee stated that

> [e]ven assuming that [*Heiner*] would be followed today, your committee believes that the approach taken under the bill is distinguishable from the statute which was held to be unconstitutional. First, the bill does not provide a presumption as to whether a transfer is in contemplation of death. The theory underlying the provision does not depend on whether the transfer was in contemplation of death as a substitute for a testamentary disposition. The donor's motive is immaterial. Second, the 1932 decision dealt with the impact of the contemplation of death rules under a taxing statute where substantial differences in tax liability would have risen [*sic*], depending upon whether or not a lifetime transfer was included in a decedent's gross estate because no gift tax was imposed at that time.

Id.

[207] *Id.*

[208] 1976 Act § 2001(a)(5) (amending I.R.C. § 2035(b)(1) (1954)).

[209] See JOINT COMMITTEE ON TAXATION, *supra* note 80, at 529.

[210] 1976 Act § 2001(a)(5) (amending I.R.C. § 2035(b)(2) (1954)).

[211] *Id.*

[212] Treas. Reg. § 20.2035-1(e) (1958). If the transferee had made improvements or

The result of the gross-up rule is the imposition of an estate tax on the amount of any gift tax paid by the decedent within three years of his death. Since estate tax is imposed on the taxable estate before any reduction for the amount of any estate tax liability,[216] this new rule thus equalizes the treatment between transfers made within the three-year period and testamentary transfers. The estate will, however, effectively receive a tax credit for this gift tax paid due to operation of the unified system whereby the transfer tax liability for cumulative transfers, *i.e.* taxable estate plus adjusted taxable gifts, is reduced by all tax payable on gifts made after December 31, 1976.[217]

C. *Significance of the New Rule in the Perspective of a Unified Tax System*

Under separate estate and gift tax systems, the tax consequences of including a gift in the donor's gross estate could be quite significant,

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additions to the property transferred, any resulting increase in the value of the property is not considered in ascertaining the value of the decedent's gross estate. If the estate elects under I.R.C. § 2032 to use the alternate valuation date, the amount includable in the estate would be the value of the property transferred as of this alternate date. *Id.*

[213] *See* E. CLARK, L. LUSKY & A. MURPHY, GRATUITOUS TRANSFERS 1019-21 (1977).

> Since the gift tax paid on a lifetime transfer which is included in a decedent's gross estate is taken into account both as a credit against the estate tax and also as a reduction in the estate tax base, substantial tax savings can be derived under present law by making so-called "deathbed gifts" even though the transfer is subject to both taxes.

1976 H.R. REP., *supra* note 14, at 12.

[214] *See* 1976 Act § 2001(a)(5) (amending I.R.C. § 2035(c) (1954)).

> To eliminate this tax avoidance technique, the committee believes that the gift tax paid on transfers made within 3 years of death should in all cases be included in the decedent's gross estate. This "gross-up" rule will eliminate any incentive to make deathbed transfers to remove an amount equal to the gift taxes from the transfer tax base.

1976 H.R. REP., *supra* note 14, at 12. "The amount of gift tax subject to this rule would include tax paid by the decedent or his estate on any gift made by the decedent or his spouse" after December 31, 1976. *Id.* at 14.

[215] I.R.C. § 2035; 1976 H.R. REP., *supra* note 14, at 14. The rationale underlying the exclusion of tax so paid is that the spouse's payment of the tax does not reduce the decedent's estate at the time of death.

[216] *See* I.R.C. §§ 2051 to 2054; 1976 H.R. REP., *supra* note 14, at 14.

[217] 1976 Act § 2001(a)(1) (amending I.R.C. § 2001(b)(2) (1954)).

especially where the estate rates were higher than the gift rates. A unified tax system greatly reduces the importance of this inclusion since the same rate schedule is applicable to both lifetime and testamentary transfers.[218] Adverse tax consequences, however, could accrue under the unified system by the later inclusion of the gift in the gross estate where the property has appreciated between the date of the gift, *i.e.* the date on which gift tax liability is determined, and the date of the donor's death. In this situation, the unified transfer tax will be imposed on the estate tax value, which includes appreciation not previously subjected to taxation.[219]

Inclusion of the gift in the estate could also lead to at least one favorable tax consequence. By including the gift as a part of the gross estate, the amount of the maximum marital deduction available to the estate is increased.[220]

D. *The Problem of Split Gifts*

The new law makes no change in the rule that gifts made within three years of death by a decedent, but treated as made in part by the other spouse under the gift-splitting provisions of the Code, are taxed in full in the decedent's estate.[221] However, for purposes of computing the tax liability of the transferor's estate, any gift tax paid by the spouse in connection with this transfer will be treated as tax payable with respect to gifts made by the decedent. Such treatment, of course, will reduce the decedent's estate tax liability.[222]

On the other hand, the spouse who actually made no gift may lose all or part of his unified tax credit. Under prior law, a spouse who consented to split a gift made entirely by the other spouse and who, as a result, claimed all or part of his specific gift tax exemption against the split gift, could not reclaim the exemption even though the entire gift was subsequently included in the estate of the transferor spouse.[223] Similarly, the portion of his unified credit claimed by a spouse under similar circumstances will not be restored to him under the new law.[224]

IV. THE CARRYOVER BASIS PROVISION AND ITS INCUMBENT INCOME TAX CONSEQUENCES

A. *The Demise of the Stepped-Up Basis*

From an income tax standpoint, the most desirable means of gratuitously transferring appreciated property has historically been the testamentary transfer. Although estate taxes might be imposed on such transfers,[225] income taxes on the gain inherent in the appreciated property could be forever avoided. This so-called "tax loophole" accrued from the application of these income tax rules: Death is not a realization event,[226] and a recipient of inherited property acquires a "stepped-up" basis in that property.[227] The first rule operates to exempt the decedent's estate from the payment of income taxes on accrued appreciation.[228] The second rule, which has long been the subject of controversy,[229] also exempts the recipient from the payment of income taxes on appreciation accruing while the decedent held the property. This latter result is accomplished by giving the recipient a basis in the appreciated property which, for purposes of determining gain or loss on a subsequent sale or other disposition, is equal to the fair market value of the property on the date of the decedent's death.[230] Upon subsequent disposition, the recipient thus pays income taxes only on the gain on the inherited property accruing after the decedent's death.[231]

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[218] 1976 Act § 2001(a)(1) (amending I.R.C. §§ 2001, 2502 (1954)).

[219] See note 212 *supra*.

[220] 1976 H.R. REP., *supra* note 14, at 14.

[221] *See* Rev. Rul. 54-246, 1954-1 C.B. 179.

[222] 1976 Act § 2001(a)(1) (amending I.R.C. § 2001(d) (1954)).

[223] Ingalls v. Commissioner, 336 F.2d 874, 876 (4th Cir. 1964) (per curiam).

[224] 1976 H.R. REP., *supra* note 14, at 13.

While denominated a "stepped-up" basis,[232] this rule could operate to give the recipient of inherited property a "stepped-down" basis. If the property has depreciated between the date of purchase by the decedent and the date of the decedent's death,[233] the recipient would receive a basis, for income tax purposes, equal to fair market value on the date of death.[234] The recipient would thereby lose a potential deduction for the depreciation accruing prior to the decedent's death.

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[225] In the absence of an exemption, deduction or tax credit, taxes will be imposed by I.R.C. § 2001 (amended 1976).

[226] See Surrey, *The Supreme Court and the Federal Income Tax: Some Implications of the Recent Decisions*, 35 Ill. L. Rev. 779, 791 (1949). For discussions of realization, *see generally* Helvering v. Horst, 311 U.S. 112, 116 (1940) (the realization doctrine is based on administrative convenience); Eisner v. Macomber, 252 U.S. 189, 204-08 (1920) (implied that realization is a constitutional prerequisite to income taxation); Lowndes, *Current Conceptions of Taxable Income*, 25 Ohio St. L.J. 151 (1964); Mullock, *Current Conceptions of Taxable Income—A Comment*, 26 Ohio St. L.J. 43 (1965); Mullock, *The Constitutional Aspects of Realization*, 31 U. Pitt. L. Rev. 615 (1970).

[227] I.R.C. § 1014(a).

[228] While income may have been realized, it will not be recognized until there is a realization event. Since death is not a realization event, the decedent's estate will pay no income tax on the accrued appreciation. *See* Surrey, *supra* note 226, at 791.

[229] For example, Congressman Al Ullman has labeled the stepped-up basis as "the main criticism in all of the tax code." 122 Cong. Rec. H10,263 (daily ed. Sept. 16, 1976).

[230] I.R.C. § 1014(a). In case of an election under *id.* § 2032, the beneficiary's basis will equal fair market value on the alternate valuation date.

[231] Gain on the disposition of the property will be determined by subtracting the beneficiary's adjusted basis (fair market value, date of death or alternate valuation date) from his amount realized. *Id.* § 1001(a).

[232] The usual case is that property held by an estate appreciates rather than depreciates.

[233] If elected, however, the alternate valuation would replace the date of death value. *See* I.R.C. §§ 1014(a), 2032.

The income tax consequences accruing from the basis rules applicable to inter vivos gifts have always been far less advantageous on the gain side.[235] Specifically, a donee's basis in property acquired by gift equals the basis of that property to the donor immediately before the transfer,[236] adjusted only by certain federal gift taxes paid on the transfer.[237] This "carryover" basis is subject to one exception: for purposes of computing a loss on the subsequent disposition by the donee, the basis cannot exceed the fair market value of the property on the date of the transfer.[238] On the gain side, the donee must recognize as gain the excess of his amount realized[239] over the carryover basis.[240] Accordingly, appreciation occurring between the date of the donor's purchase[241] of the property and the date of the gift and appreciation occuring after the donee's acquisition of the property are taxed to the donee. As in the estate tax area, the act of making the gift is not a realization event,[242] thereby exempting the donor from income taxation on the accrued appreciation. The carryover basis, however, preserves the potential gain for the donee. Unlike the estate tax rule, the potential income tax liability on that gain is not obliterated but instead merely postponed until the donee disposes of the property.[243]

Under prior law, a taxpayer considering the possibility of making a taxable gift would often weigh the potential estate tax liability against the combined gift taxes and potential income taxes for the donee. Despite the higher estate tax rates under prior law,[244] substantial tax savings could accrue from holding the property until death and thereby avoiding income taxes on the accrued appreciation. To eliminate the existing tax discrimination between lifetime transfers by gifts or sale[245] and testamentary transfers,[246] the 94th Congress proposed an extension of the carryover basis rule to the estate tax area. By doing so, proponents of the change hoped to eliminate the "lock-in-effect" of the stepped-up basis rule which effectively encouraged taxpayers to hold property until death.[247] Again, the lawmakers' objective was the equalization of tax treatment for all gratuitous transfers.[248]

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[234] Again at the estate's election, this value could be as of the alternate valuation date. I.R.C. §§ 1014(a), 2032.

[235] *See* I.R.C. § 1015(a). See text accompanying notes 238 through 241 *infra*.

[236] *Id.*

[237] 1976 Act § 2005(c) (amending I.R.C. § 1015(d)(b) (1954)). This provision allows an increase in basis for federal gift taxes attributable to the appreciation in the gift. Prior to the Tax Reform Act of 1976, the carryover basis could be adjusted by all gift taxes paid on the transfer. This adjustment, however, could not exceed the fair market value of the gift on the date of the gift. See text accompanying notes 238 through 240 *infra*.

[238] I.R.C. § 1015(a). If the property is sold for an amount that exceeds the fair market value on the date of the transfer, but is less than the donor's adjusted basis in the property, neither gain nor loss will be recognized.

[239] *Id.* § 1001(b) defines "amount realized" as the sum of any money received plus the fair market value of other property received in the sale or exchange.

[240] *Id.* § 1001(a).

[241] If the donor acquired the property by gift, the purchase date would be the last time that someone acquired the property for adequate consideration.

[242] *See* Surrey, *supra* note 226, at 791.

[243] When the donee disposes of the property, a realization event will have occurred requiring that all gain be recognized due to the operation of the carryover basis. I.R.C. § 1001(a).

[244] I.R.C. § 2001(c) (1954) (amended 1976).

B. *The General Rule*

The elimination of the stepped-up basis rule became the dominant point of controversy in the Tax Reform Act of 1976.[249] Characterization of the old rule as a "tax loophole" primarily aiding the wealthy[250] and recognition of the rule as a source of lost revenue[251] apparently led to the acceptance of the most significant reform measure ever proposed in the estate tax area—adoption of the carryover basis rule for testamentary transfers.[252] For property acquired from a decedent dying after December 31, 1976, the recipient will take, for income tax purposes, a basis equal to the decedent's adjusted basis in that property at the time of his death,[253] with certain adjustments.[254] With a few exceptions[255] and one minor exemption,[256] this new rule applies to all property acquired by bequest, devise, inheritance or other testamentary transfers.[257]

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[245] A taxpayer who sells property during his lifetime pays income taxes on the gain. His estate would also pay estate taxes on the same proceeds at the time of his death. *See* 1976 H.R. Rep., *supra* note 14, at 36-37.

[246] *See id.*

[247] *See id.* at 37; 122 Cong. Rec. H10,268 (daily ed. Sept. 16, 1976) (remarks of Congressman Vanik).

[248] *See* 1976 H.R. Rep., *supra* note 14, at 6.

[249] *See* 122 Cong. Rec. H10,226-H10,227, H10,263-H10,275 (daily ed. Sept. 16, 1976).

[250] "[The stepped-up basis rule] is an issue that most economists and tax experts say is probably the biggest loophole in the whole tax code." 122 Cong. Rec. H10,264 (daily ed. Sept. 16, 1976) (remarks of Congressman Ullman).

[251] "[S]ooner or later, Congress is going to have to face up to the issue that over $15 billion of incomes goes entirely untaxed each year because of the step-up in basis at death." *Id.* at H10,227. An interesting discussion on the estimated revenue gains that will accrue from adoption of the carryover basis appears at *id.* H10,226 (daily ed. Sept. 16, 1976), and in 1976 H.R. Rep., *supra* note 14, at 8 (Tables 1 & 2).

[252] As Congressman Ullman stated,

> [t]he compromise that we bring back to the Members on the "stepped-up" basis problem is . . . the centerpiece of this legislation. This is the part of the package that will make this [estate and gift] tax reform bill stand up for a long time to come.

122 Cong. Rec. H10,263 (daily ed. Sept. 16, 1976).

[253] I.R.C. § 1023(a)(1).

[254] *Id.* §§ 1023(c)-(e),(h).

[255] See notes 258 through 260 *infra.*

[256] I.R.C. § 1023(b)(3).

Excepted from the application of the new rule are life insurance proceeds,[258] income in respect of a decedent[259] and certain other items of property already subject to income taxation under existing law.[260] In addition, the executor of a decedent's estate may elect[261] to exclude from the operation of the new rule household and personal effects of the decedent having an aggregate value not in excess of $10,000.[262] This latter exemption was accepted in recognition of the difficulty inherent in determining the bases of such property and the high probability of depreciation, rather than appreciation, with respect to these assets.[263]

For most carryover-basis property,[264] the new rule is equally applicable to the determination of gain and loss on the subsequent disposition by the recipient.[265] The loss treatment represents a departure from the gift tax rule after which Congress was attempting to pattern the basis rules for inherited property.[266] This difference in treatment was thought to be justified by the fact that all of the decedent's property passes at death, not simply property selected by the transferor.[267] In contrast, a donor could select depreciated assets as the subject matter for inter vivos gifts. The carryover basis rule is not applicable, however, for purposes of determining loss in the case of personal and household effects which would otherwise be carryover-basis property.[268] Recognizing that the decedent would not have been entitled to a deduction for losses attributable to such items, Congress limited the basis of such property, for loss purposes, to its fair market value as of the decedent's date of death.[269]

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[257] Any property passing from a decedent within the meaning of I.R.C. § 1014(b) and not specifically exempted by I.R.C. § 1023(b)(2) and (3) is covered by the new rules. *Id.* § 1023(b).

[258] *See id.* § 1023(b)(2)(B).

[259] *See id.* § 1023(b)(2)(A).

[260] *See id.* §§ 1023(b)(2)(D), (e). Property included in the gross estate due to the operation of I.R.C. §§ 2035, 2038 or 2041, which has been disposed of before the decedent's death in a transaction where gain or loss was recognized, also will not be covered by this section.

[261] *Id.* § 1023(b)(3)(c). Such election must be made not later than the date prescribed for filing the estate tax return.

[262] *Id.* § 1023(b)(3)(A),(B).

[263] *See* 1976 H.R. REP., *supra* note 14, at 38.

[264] I.R.C. § 1023(a)(1).

[265] *Id.*

[266] *See* H.R. REP., *supra* note 14, at 37-38.

[267] JOINT COMM. ON TAXATION, *supra* note 80, at 553; 1976 H.R. REP., *supra* note 14, at 37-38.

[268] I.R.C. § 1023(a)(2).

[269] *See* 1976 H.R. REP., *supra* note 14, at 38. If the election under I.R.C. § 2032 is made, the basis would be limited to the fair market value on the alternate date. *See* JOINT COMM. ON TAXATION, *supra* note 80, at 553.

The immediate result of the carryover basis is the shifting of the potential income tax liability on appreciated property (and the potential income tax deduction on depreciable property) from the decedent to the recipient of the inherited property.[270] This shifting of tax liability includes any potential recapture of depreciation taken by the decedent prior to his death. Upon sale or disposition of the property by the decedent, the accrued gain or loss will be recognized.

C. Adjustments to Carryover Basis

The new rules make provisions for four possible upward adjustments to the carryover basis.[271] With respect to property that a decedent is treated as having held on December 31, 1976, a "fresh-start" rule allows an increase in basis for appreciation occurring before January 1, 1977.[272] Such a procedure will operate to prevent the imposition of income tax on appreciation accruing prior to the Act's effective date. A further increase is provided for federal and state estate taxes attributable to the appreciation in the property and paid by the estate[273]—a treatment similar to that found in the gift tax provisions. This increase for transfer taxes paid avoids the imposition of both an estate tax and an income tax on a portion of the same property, *i.e.* its appreciation.[274]

To relieve the income tax burden on beneficiaries of smaller estates, a minimum basis rule was adopted whereby the bases of appreciated carryover-basis property may be increased until the total bases of all carryover-basis property[275] equal $60,000.[276] Finally, the recipient of carryover-basis property can increase the basis of that property by the amount of the state death taxes paid by him which were attributable to the remaining appreciation in the carryover-basis property.[277] With the exception of the "fresh-start" rule,[278] these adjustments cannot be used to increase the basis of carryover-basis property above the property's fair market value as of the decedent's date of death.[279]

1. The Fresh-Start Adjustment

A beneficiary acquiring property that is treated as held by a decedent on December 31, 1976,[280] may increase his carryover basis by the excess of the value of that acquired property, as of December 31, 1976, over the decedent's adjusted basis in the property on the same date, *i.e.* the pre-1977 appreciation.[281] In effect, this fresh-start adjustment applies the stepped-up basis rule of prior law to appreciation occurring before January 1, 1977, on certain qualifying property.[282] The operation of the fresh-start basis adjustment, however, is limited to appreciated property that the decedent is treated as holding on December 31, 1976.[283] Accordingly, the adjustment may be made for all property owned by the decedent at death and acquired on or before December 31, 1976. The rule also encompasses property owned at death and acquired in certain transactions occurring after December 31, 1976. One such post-1976 transaction is a non-taxable exchange in which the decedent acquired property, the basis of which was determined by reference to his basis in other property actually held by him on December 31, 1976.[284] Acquisitions by way of gift or trust transfer are also covered if the donor or trustee actually held the property on December 31, 1976.[285] Finally, this adjustment is appropriate for property held by the decedent on December 31, 1976, which was the subject matter of a transfer made within three years of death.[286]

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[270] *See* JOINT COMM. ON TAXATION, *supra* note 80, at 553.

[271] I.R.C. §§ 1023(c)-(e), (h).

[272] *Id.* § 1023(h).

[273] *Id.* § 1023(c).

[274] *See* JOINT COMM. ON TAXATION, *supra* note 80, at 553; H.R. REP. NO. 1515, 94th Cong., 2d Sess. 612-13 (1976).

[275] This provision includes appreciated and depreciated carryover-basis property. I.R.C. § 1023(d)(1).

[276] *Id.*

[277] *Id.* § 1023(e).

[278] See text accompanying notes 287 through 291 *infra*.

[279] I.R.C. § 1023(f)(1).

Computation of the amount of the fresh-start adjustment for a particular item of property depends upon the establishment of the property's fair market value on December 31, 1976, and the decedent's adjusted basis as of that date.[287] The excess of the first figure over the second is the amount of the basis adjustment.

In the case of marketable bonds or securities, the computation is simplified by the acceptance of quoted values on December 31, 1976, as fair market value.[288] However, such quotes may be utilized only with respect to property for which quotes are readily obtainable through a national, regional or city exchange, or through an established brokerage firm.[289] Interestingly, usage of the quoted value in computing appreciation which occurred before 1977 and the corresponding adjustment to the carryover basis can lead to the curious result of giving the beneficiary a basis in excess of the estate tax value of the asset.[290] Such a result is neither probable under the formula method for non-quoted assets hereinafter described nor permissible with respect to other basis adjustments.[291]

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[280] *Id.* § 1023(h)(1), (2). Any property which is carryover-basis property and reflects the adjusted basis of property held by the decedent on December 31, 1976, may qualify for the adjustment.

[281] *Id.* § 1023(h). The operative effect of this rule is illustrated at note 327 *infra*.

[282] *See* H.R. REP., *supra* note 1, at 612-13.

[283] I.R.C. § 1023(h).

[284] *See* JOINT COMM. ON TAXATION, *supra* note 80, at 555.

[285] *Id.*

[286] *Id.*

[287] I.R.C. § 1023(h).

[288] *Id.*; JOINT COMM. ON TAXATION, *supra* note 80, at 556.

[289] H.R. REP., *supra* note 1, at 613.

For all property other than marketable bonds and securities, computation of the basis adjustment for pre-1977 appreciation is much more complex since a formula is used to determine the appreciation occurring before January 1, 1977.[292] The formula method, adopted to avoid the need for appraisals of property owned on December 31, 1976,[293] applies regardless of evidence establishing the property's exact value on that date and, therefore, the portion of appreciation actually attributable to the pre-1977 holding period of the decedent.[294]

Basic to the formula method is an assumption that all appreciation in the property between the date of acquisition by the decedent and the date of his death accrued at a daily uniform rate.[295] The amount of that appreciation deemed to have occurred before 1977 is the sum of (1) the depreciation, amortization or depletion adjustments to basis that are attributable to the pre-1977 holding period,[296] and (2) the excess of the total appreciation in the property, *i.e.* fair market value at date of death less the decedent's adjusted basis, over all adjustments for depreciation, amortization or depletion for decedent's entire holding period, multiplied by the following fraction: the total number of pre-1977 days in the decedent's holding period over the total number of days in the decedent's holding period.[297] The sum thus obtained is the amount of the fresh-start adjustment.[298]

As with most reformist legislation, this provision of the Act was not spared specific limitations on its operation. For example, the upward adjustment for pre-1977 appreciation must be accomplished prior to making the other adjustment permitted by the Code.[299] Also, with respect to property other than marketable bonds and securities, the fresh-start adjustment in most cases will not be utilized to increase the beneficiary's basis above the property's fair market value on the decedent's date of death.[300] This latter treatment, however, is similar to other permissible adjustments under the Act.

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[290] The asset could have appreciated in value between December 31, 1976, and the decedent's date of death.

[291] I.R.C. §§ 1023(f)(1),-(h)(2)(B).

[292] *Id.* § 1023 (h) (2)(B).

[293] See JOINT COMM. ON TAXATION, *supra* note 80, at 555; H.R. REP., *supra* note 1, at 612.

[294] *See* H.R. REP., *supra* note 1, at 613.

[295] JOINT COMM. ON TAXATION, *supra* note 80, at 555.

[296] I.R.C. § 1023(h)(2)(B)(ii).

[297] *Id.* §§ 1023(h)(2)(B)(i),-(c).

[298] *Id.* § 1023(h)(2)(B).

[299] JOINT COMM. ON TAXATION, *supra* note 80. This result stems from the application of I.R.C. § 1023(f)(2), which requires that the fresh-start adjustment be made before any other adjustments are made to the property's basis. H.R. REP., *supra* note 1, at 613.

In light of the complexities surrounding these provisions, it is encouraging to note that both the legislative history and the statutes contemplate the issuance of regulations to resolve several important issues. Specifically, the Secretary of the Treasury is specially authorized to prescribe regulations treating the recognition of substantial improvements to property as separate property for purposes of computing the fresh-start adjustment.[301] Additionally, regulations are to be promulgated with respect to the relationship between the fresh-start adjustment and the potential recapture of depreciation to be attributed to the beneficiary.[302]

2. Adjustment for Federal and State Estate Taxes

A further adjustment to the basis of carryover-basis property is permitted for federal and state estate taxes attributable to the net appreciation[303] in that property included in the estate.[304] The adjustment may be made for all taxes imposed on the net appreciation by sections 2001 and 2101 of the Code, including estate, inheritance, legacy or succession taxes imposed by a state or the District of Columbia, after reductions for any applicable tax credits.[305] However, the adjustment is limited to taxes actually paid by the estate[306] for which the estate is liable under local law or the governing instrument.[307]

Computation of the adjustment is made on an asset-by-asset basis so that depreciation in some assets will not be used to offset appreciation in other assets.[308] The total amount of the federal and state estate taxes imposed on the estate, after reduction for available credits, is multiplied by this fraction: the amount of net appreciation in the particular asset (the estate tax value less the decedent's adjusted basis after making the fresh-start adjustment)[309] over the total estate tax value of all of the decedent's property subject to taxation.[310] This computation will yield the amount of estate taxes imposed on the appreciation that has accrued as of the decedent's date of death and, therefore, the upward adjustment needed to effectively give the beneficiary a deduction, for income tax purposes, for estate taxes paid on appreciation.[311]

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[300] I.R.C. §§ 1023(f)(1),-(h)(2)(B).

[301] *Id.* § 1023(h)(2)(D).

[302] JOINT COMM. ON TAXATION, *supra* note 80, at 556.

[303] The Code defines net appreciation as

> the amount by which the fair market value of [the] property exceeds the adjusted basis of such property immediately before the death of the decedent [after making the fresh start adjustment].

I.R.C. § 1023(f)(2).

[304] *Id.* § 1023(f)(3)(A),(B). See note 327 *infra* for an illustration of the operation of this adjustment.

[305] *Id.* § 1023(f)(3)(A),(B).

[306] *Id.* § 1023(f)(3)(B).

[307] JOINT COMM. ON TAXATION, *supra* note 80, at 557-61.

[308] *See* I.R.C. § 1023(c). "If it were not for this rule, heirs receiving appreciated property might be unfairly disadvantaged *vis a vis* other heirs." JOINT COMM. ON TAXATION, *supra* note 80, at 557.

For purposes of making the above calculations, some special rules are provided for determining which of the decedent's property is deemed to be taxable. Such property will neither enter into the computation of the upward adjustment for property that is subject to taxation nor receive an upward adjustment in its carryover basis.[312] Obviously, property "not subject to tax" includes all property qualifying for deductions available to the estate.[313] This phrase will cover property qualifying for the marital and charitable deductions[314] but will not, for administrative reasons, include property qualifying for the new orphan's exclusion.[315] Official explanation of these provisions, however, predicts that subsequent regulations will exclude from the equation only property actually used to fund the marital and charitable bequests.[316] Additionally, a surviving spouse's interest in community property constitutes property not subject to tax for purposes of this adjustment.[317] A final rule treats only the net value of property subject to a nonrecourse mortgage as property that is subject to taxation.[318]

3. Minimum Basis Adjustment

A third adjustment allows the executor of an estate to review the aggregate bases of all carryover-basis property and, after making the fresh-start and estate tax adjustments previously described,[319] to adjust the bases of certain assets by an allocable portion of the excess of $60,000 over the aggregate of these carryover bases.[320] To compute the minimum basis adjustment, the aggregate bases of all carryover-basis property, both appreciated and depreciated,[321] is subtracted from $60,000.[322] The total adjustment is then allocated among individual appreciated carryover-basis assets by multiplying the total adjustment by this fraction: the net appreciation in the particular appreciated carryover-basis asset over the total appreciation in all carryover-basis property.[323]

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[309] I.R.C. § 1023(f)(2).

[310] *Id.* § 1023(c).

[311] 1976 H.R. Rep., *supra* note 14, at 37.

[312] I.R.C. § 1023(c).

[313] *Id.* § 1023(f)(4)(A).

[314] *Id.*

[315] 1976 H.R. Rep., *supra* note 14, at 40.

[316] *See* Joint Comm. on Taxation, *supra* note 80, at 557; 1976 H.R. Rep., *supra* note 14, at 40.

[317] Additionally, no adjustment will be made to the basis of the surviving spouse's share of community property because it is not included in the decedent's estate. Joint Comm. on Taxation, *supra* note 80, at 558; 1976 H.R. Rep., *supra* note 14, at 40.

[318] I.R.C. § 1023(g)(4). An executor could include the full value of the property in the gross estate and take a deduction for the amount of the mortgage even though the estate is not liable. To assure equal treatment for all properties "subject to" mortgages, the Act provides that only the net value of such property is to be considered "subject to tax" regardless of how that property is treated in the estate tax return. *Id.* For an example of this treatment, see Joint Comm. on Taxation, *supra* note 80, at 558.

[319] I.R.C. § 1023(f)(2).

To arrive at the aggregate bases of all carryover-basis property and determine the availability and extent of the minimum basis adjustment, cash must be included in the calculations.[324] However, for personal or household effects that constitute carryover-basis property, only that portion of their adjusted basis which does not exceed the item's fair market value on the decedent's date of death is included as part of the aggregate basis.[325]

4. Adjustment for Succession Taxes Paid by the Beneficiary

The final adjustment to the carryover basis covers the state succession taxes, again attributable to inclusion of net appreciation[326] in the estate.[327] This adjustment is limited to those estate, inheritance, legacy or succession taxes imposed by a state or the District of Columbia and actually paid by the recipient of carryover-basis property.[328] Coverage does not include those taxes for which the estate is liable.[329]

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[320] *Id.* § 1023 (d); *see* JOINT COMM. ON TAXATION, *supra* note 80, at 559. This adjustment, however, does not apply to carryover-basis property acquired or passing from a decedent who, at his death, was a nonresident alien. I.R.C. § 1023(d)(3). *See* note 327 *infra* for an example of the operation of this rule.

[321] I.R.C. § 1023(d)(1); *see* 1976 H.R. REP., *supra* note 14, at 41.

[322] I.R.C. § 1023(d)(1).

[323] *Id.*

[324] 1976 H.R. REP., *supra* note 14, at 41. Of course, items not constituting carryover-basis property do not enter into the computation.

[325] I.R.C. § 1023(d)(2). If the executor of an estate so elects, personal and household effects valued not in excess of $10,000 will not constitute carryover-basis property and, therefore, will not enter into the computation.

[326] *Id.* § 1023(f)(2) (fair market value less adjusted basis after making other adjustments).

[327] *Id.* § 1023(e).

> For purposes of computing gain, the application of the rules which increase the basis of carryover basis property can be illustrated by the following example. Assume that the decedent dies in 1977 with personal effects with a fair market value of $10,000 and an adjusted basis of $50,000 and marketable stock with fair market value of $390,000 and a basis of $25,000. His will leaves his entire estate to his surviving spouse. The value of the stock on December 31, 1976, was $39,000. If it is assumed that there are no funeral or administration expenses, there will be a gross estate of $400,000, a marital deduction of $250,000, and a taxable estate of $150,000. In this case, there is a basic tax of $38,800 less a credit of $30,000 leaving an estate tax of $8,800.
>
> Assume in this example that the State death taxes paid by the widow are equal to the maximum State death tax credit and that the entire amount is subject to tax. Since the taxable estate in this case is $150,000, the "adjusted taxable estate" will be $90,000. Consequently, the maximum amount of the State death tax credit is $400 and the net estate tax is $8,400.

Like the adjustment for federal and state estate taxes paid by the estate, the computation and adjustments are made only with respect to property subject to tax.[330] To compute the adjustment for a particular asset, the total succession taxes paid by the recipient are multiplied by this fraction: the net appreciation (fair market value at date of death less the adjusted basis of the decedent after making other available adjustments)[331] in the asset over all property acquired by that recipient and subject to succession taxes.[332] Property "subject to tax" probably will be defined by reference to local law and by applying principles similar to those discussed for the federal and state estate tax adjustment.[333]

Assume that the executor makes the election to exclude all of the personal assets from carryover basis property. Thus, the basis of the personal assets is their fair market value as under existing law. In addition the basis of the stock under the "fresh start" rule is initially increased to $39,000.

Because of the marital deduction, $250,000 of the $400,000 of gross estate is deemed to be not subject to tax. Of the remaining $150,000, $3,500 ($10,000 multiplied by $150,000 divided by $400,000) is deemed to be personal effects. Thus, the portion of the carryover basis property (i.e., the stock) which is subject to tax is $146,250 ($150,000 minus $3,750). The adjusted basis of that carryover basis property is $14,625 ($146,250 multiplied by $39,000 divided by $390,000). Consequently, the amount of appreciation in the carryover basis property is $131,625 ($146,250 minus $14,625). Thus, the basis of all carryover basis property is increased by $7,371 ($131,625 multiplied by $8,400 divided by $150,000) to $46,371 ($39,000 plus $7,471).

The basis of all carryover basis property is then increased to a minimum basis of $60,000. Since the personal effects are not considered carryover basis property by reason of the executor's election, the basis of these assets does not count toward the minimum basis of $60,000. As a result, the basis of the stock is increased by $13,629 to $60,000.

Finally, the basis is further increased by any State inheritance or estate taxes paid by the recipient with respect to the appreciation on the carryover basis property. After the other adjustments permitted under the Act, the appreciation in the carryover basis property is $330,000 ($390,000 less $60,000). The portion of the State death tax allocable to the appreciation in the carryover basis property is $330 ($330,000 multiplied by $400 divided by $400,000). Consequently, the basis of the carryover basis property is increased from $60,000 to $60,330.

JOINT COMM. ON TAXATION, *supra* note 80, at 560-61.

[328] I.R.C. § 1023(e)(2).

[329] *Id.*

[330] *Id.* § 1023(e); *see* JOINT COMM. ON TAXATION, *supra* note 80, at 559.

[331] I.R.C. § 1023(f)(2).

[332] *Id.* § 1023(e).

[333] *See id.* § 1023(f)(4)(B); 1976 H.R. REP., *supra* note 14, at 42.

D. Some Collateral Problems

1. Satisfaction of a Pecuniary Bequest with Appreciated Property

Prior to the Tax Reform Act of 1976, a transfer of appreciated property[334] by an estate to satisfy a fixed pecuniary bequest was a taxable event. Thus, the estate was required to recognize gain on the excess of the property's value on the date of distribution over the estate's basis in that property, *i.e.* fair market value on the chosen valuation date.[335] This rule was particularly important to an estate in which the decedent's will utilized a pecuniary marital bequest formula.[336] If appreciated property was transferred to fund that bequest, the estate must recognize any gain accruing since its acquisition of the property.[337]

The rule requiring recognition of gain in such cases continues under the new Act. However, to prevent the adoption of the carryover basis from increasing the gain required to be recognized by the estate in such instances,[338] a new Code provision limits the gain to be recognized to the difference between the value on the date of distribution and the value on the applicable estate tax valuation date.[339]

2. Carryover Basis for Gifts

Amendment of the carryover basis provision for gifts limits the upward adjustment for federal gift taxes paid to only those gift taxes attributable to the net appreciation in the gift property.[340] Formerly, all federal gift taxes paid served as an upward adjustment.[341] This change, however, conforms with the carryover-basis adjustments for recipients of inherited property.[342]

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[334] In this context, the term "appreciated property" refers to property that has appreciated in the hands of the estate.

[335] Kenan v. Commissioner, 114 F.2d 217, 220 (2d Cir. 1940); Rev. Rul. 56-270, 1956-1 C.B. 325.

[336]
> A formula pecuniary gift is a gift to a surviving spouse of an amount equal to the maximum marital deduction to which the estate is entitled, less the value of any other interests passing to the surviving spouse that qualify for the marital deduction. It is, in other words, the gift of an amount which will equal the maximum marital deduction to which the estate is entitled when added to the other interests that pass to the surviving spouse apart from the formula gift and qualify for the marital deduction. The amount of the gift may be expressed in terms either of fifty per cent of the adjusted gross estate or of the maximum marital deduction to which the estate is entitled.

C. LOWNDES, R. KRAMER & J. MCCORD, *supra* note 19, at 945.

[337] Rev. Rul. 56-270, 1956-1 C.B. 325.

[338] 1976 H.R. REP., *supra* note 14, at 45.

[339] I.R.C. § 1040(a). Section 1040(b) authorizes the issuance of regulations to explain the precise application of this rule with respect to certain trusts.

[340] 1976 Act § 2005(c) (amending I.R.C. § 1015(d)(6) (1954)).

[341] I.R.C. § 1015(d)(1) (1954) (amended 1976).

[342] *Id.* § 1023(a)(1).

3. Income in Respect of the Decedent

Items includable in a decedent's gross estate but within the definition of "income in respect of a decedent" are not carryover-basis property since these items are already subject to income tax.[343] Present law continues to give the recipient of income in respect of a decedent an income tax deduction for estate[344] taxes attributable to the inclusion of the item in the estate. Under prior law, however, the taxes attributable to the item were computed as if that item were taxable at the highest estate tax rates applicable to the estate.[345] The 1976 Act alters this calculation to treat the item as taxable at the average estate tax rate,[346] in much the same way as bequests are treated, for purposes of the adjustments to the carryover basis.[347]

E. Practical Problems Accruing from the Basis Rules

The carryover-basis provision is one of the most complex sets of interrelated rules, adjustments, exceptions, exemptions and elections ever to be assembled under one Code section. Its proper application ultimately will depend upon the availability of information concerning the decedent's basis, the date of acquisition for each carryover-basis asset and the effective utilization of that information in estate administration.

The problem of establishing a decedent's adjusted basis and date of acquisition has been aptly labeled an "administrative nightmare."[348] Recognizing the possibility that the necessary records may never have existed or may have been destroyed, Congress adopted a rule to aid an executor who is unable to accurately establish the decedent's adjusted basis in a particular asset. In such a case, the asset's fair market value on the date of its acquisition by the decedent will be accepted in lieu of the decedent's actual basis.[349] However, if the executor is also unable to ascertain the asset's date of acquisition, no special relief is available.[350]

Although an executor is able to assimilate the appropriate records for establishing basis, his "administrative nightmares" have not ended. Remaining is the collossal task of computing the four upward adjustments to basis. Once this task is complete, the executor is prepared to meet his added duties of supplying information to the Treasury Department[351] and to the legatees and devisees[352] concerning the carryover basis of all assets. Failure to properly comply with these informational requirements will, in the absence of reasonable cause,[353] lead to the imposition of civil penalties.[354]

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[343] *Id.* § 1023(b)(2)(a).

[344] *Id.* § 691(c)(3).

[345] *Id.* § 691(c) (amended 1976).

[346] *See* 1976 Act § 2005(a)(4)(B) (amending I.R.C. § 691(c) (1954)).

[347] I.R.C. § 1023(c).

[348] 112 Cong. Rec. H10,270 (daily ed. Sept. 16, 1976) (remarks of Congressman Frenzel).

[349] I.R.C. § 1023(g)(3).

[350] Section 1023(g)(3), however, indicates that fair market value as of the approximate date of acquisition may suffice.

The executor may be further perplexed by his obligation to consider the income tax problems generated by certain dispositions or distributions of estate assets. Particularly in the case of low-basis assets,[355] the immediate income tax liability accruing to the estate from the sale of assets to produce cash for meeting taxes and administrative expenses can be quite significant to the executor and residuary legatees.[356] Even more long-range income tax consequences may concern the executor who is distributing assets in-kind to satisfy pecuniary bequests.[357] Such distributions create potential income tax liability and may lead to objections from recipients as to equality of treatment among various devisees in the allocation of potential gain.[358] The extent of the executor's fiduciary obligations to take account of such income tax factors should provide potential litigation material. Even more controversial may be the extent to which the executor can take advantage of potential income tax brackets of various legatees or the intent of certain legatees to hold the property indefinitely to achieve some belated tax planning.

V. CONCLUSION

As an overall package of reform measures, the estate and gift tax provisions of the Tax Reform Act of 1976 contain some theoretically sound propositions—the concepts of a unified transfer tax and the carryover basis. In practice, however, these provisions may lead to harsh tax consequences and administrative impossibilities.

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[351] *Id.* § 6039A(a).

[352] *Id.* § 6039A(b).

[353] I.R.C. §§ 6694(a),(b).

[354] *Id.* § 6694(a). The penalty for failure to furnish the requisite information to the Treasury Department is a $100 fine for each failure, not to exceed a total of $5,000. *Id.* § 6694(b). Failure to furnish information to a beneficiary will result in a $50 fine for each failure, to a maximum of $2,500.

Because of an error in enactment, there are now two sections numbered 6694. The proper number for the section cited herein should be 6694A.

[355] Under prior law, the only gain recognized was the difference between fair market value on the date of death (or alternative valuation date, if elected) and fair market value on the sale date. Now the difference between the carryover-basis valuation and fair market value on the date of disposition will determine the amount of gain to be recognized.

[356] The estate's payment of the potentially large capital gain arising on the sale of the assets will reduce the residuary and, consequently, the legatees' inheritance.

[357] The use of appreciated property to satisfy the pecuniary obligations of the estate is a taxable event, requiring recognition of gain by the estate on the difference in the property's basis and its fair market value on the date of distribution. Rev. Rul. 57-270, 1956-1 C.B. 325.

[358] To ensure equal treatment of all pecuniary legatees, each should receive their proportionate share of low-basis assets.

The unified transfer system, consisting of the unified rate system and the unified tax credit, merits the label of a measure providing more equitable tax treatment. By equalizing the treatment between lifetime and testamentary transfers, the system will effectively equalize the treatment among small, moderate and large estates. This system, augmented by the new increased marital deductions and the more equitable joint interest provision, will also alleviate some of the tax burden which has previously been levied on small and medium-sized estates. Further, the taxation of all transfers made within three years of death achieves some consistency between taxpayers and should reduce litigation.

Congressional opponents of the carryover basis, however, fear that the tax gains achieved by these measures will be lost through the application of the carryover basis.[359] Some observers feel that its adoption will simply lead to a deferral of the tax saved through use of the larger exemption (in the form of the tax credit) and the alternative marital deduction.[360] Even more significant is the suggested possibility that the "new tax" accruing from use of the carryover basis will now apply to many persons whose estates had previously escaped federal estate taxation altogether.[361] The end result could very well be a strong incentive for heirs to continue holding property through successive generations to avoid imposition of income tax on the appreciation.[362] Such a "lock-in" effect is just what Congress hoped to discourage by enacting the carryover basis.

Growing fear has been expressed with respect to the potential administrative difficulty and costs which may arise in settling estates. The recordkeeping made necessary by the unified system and the carryover-basis provisions must begin many years before these provisions actually come into play. The complexity of these provisions, as well as the imposition of certain penalties on executors for noncompliance, have brought predictions of slow-downs in estate administration,[363] higher administrative costs for heirs and estates,[364] new grounds for litigation[365] and a possible reluctance on the part of many persons to serve as an executor.[366] Some subsidiary problems that may also cause great difficulty are the meshing of the new federal rules with state law provisions based on the old stepped-up basis concept and the pressures placed on executors by devisees and legatees for post-mortem tax planning.

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[359] 122 CONG. REC. H10,265 (remarks of Congressmen Conable), H10,266 (remarks of Congressman Schneebeli), H10,268 (remarks of Congressman Brown), H10,270 (remarks of Congressman Frenzel) (daily ed. Sept. 16, 1976).

[360] *Id.* at H10,270 (remarks of Congressman Frenzel). This is reinforced by the predictions for revenue gains from the carryover basis, which will offset those lost by the new credit and the marital deduction. 1976 H.R. REP., *supra* note 1, at 7-10.

[361] 122 CONG. REC. H10,266 (remarks of Congressman Schneebeli), H10,270 (remarks of Congressman Frenzel) (daily ed. Sept. 16, 1976).

[362] *Id.* at H10,266 (remarks of Congressman Schneebeli), H10,270 (remarks of Congressmen Hagedorn and Frenzel).

[363] *Id.* at H10,270 (remarks of Congressman Frenzel).

[364] *Id.*

[365] *Id.* at H10,264 (remarks of Congressman Conable).

Although the "stepped-up" basis had little theoretical foundation other than the policy of refusing to recognize death as a realization event, it did have the advantage of wiping the slate clean and allowing heirs to start their own accurate records. The price for this was the imposition of an estate tax, but no income tax on accrued appreciation. The carryover-basis provision will now impose an income tax on the disposition of property which has already been subjected to an estate tax. Additionally, it will afford little means of assuring accuracy in the administrative process, particularly in the case of basis determinations. Accordingly, the carryover-basis provision may prove to be the albatross of the entire reform package.

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[366] *See* Stansbury & Blazek, *Revamped Basis Rules for Inherited Property Have Far-Reaching Implications,* 46 J. TAX. 14, 16-19 (1977).

APPEALS TO THE MISSISSIPPI SUPREME COURT

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The ever-burgeoning caseload of the Mississippi Supreme Court and the expansion of the court itself[1] indicate that the number of appeals taken to the court is at an all-time high. A number of factors have contributed to this increase. First, the doctrine of abstention in the federal courts, combined with a growing desire on the part of an influential portion of the federal judiciary to limit federal jurisdiction,[2] have created more incentive than ever before to resolve disputes in the state courts. Second, for those civil litigants faced with a jurisdictional choice between the state courts and the federal courts, Mississippi's adoption of procedures nearly identical to the Federal Rules of Discovery has diluted the attractiveness of a federal forum.[3] Third, the recent increase in the number and the amount of jury awards in civil cases has transformed the appellate process into somewhat of an economic necessity. Finally, for criminal defendants, the maturation of the right to court-appointed counsel at trial, on appeal and in other post-conviction proceedings for extraordinary relief has fostered a greater willingness to go to trial and ultimately appeal the judgment or sentence.

Many practitioners, however, view an appeal to the Mississippi Supreme Court as involving little more than posting the proper appeal bond, notifying the court reporter, and filing the assignment of error and briefs. Ideally, a proper appeal should involve no more than these steps. However, for the practitioner who has suffered the embarrassment of having his appeal dismissed due to procedural or jurisdictional defects, or counsel who, once before the court, has enjoyed only a pro forma right of appeal because an alleged error was not preserved for consideration on appeal, the prospect of an appeal may loom ominously as a harrowing, even traumatic, experience.

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[1] In 1976, the Mississippi Legislature enacted a provision calling for a system of rotating commissioners. Act of May 6, 1976, 1976 Miss. Laws ch. 430, §§ 1-2. The Commissioners are chancellors and circuit court judges authorized to assist the supreme court. *Id.* See SUP. CT. OF MISS. ANN. STATISTICAL REP. 1 (1976).

[2] The landmark case of Railroad Comm'rs v. Pullman Co., 312 U.S. 496 (1941) ushered wholesale application of the abstention doctrine into the federal court system:

> The complaint . . . touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open. Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.

Id. at 498. For the conflicting views of two current Justices of the United States Supreme Court on the advisability of limiting federal jurisdiction, *see generally* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977) (urging that state courts take the initiative in the protection of human rights by grounding such decisions on state constitutional grants, thereby insulating the decisions from restrictive interpretation on review by the United States Supreme Court); Shapiro, *Mr. Justice Rehnquist: A Preliminary View,* 90 HARV. L. REV. 293, 294 (1976) (concluding that Justice Rehnquist strongly embraces the principle that "[q]uestions of the exercise of federal jurisdiction . . . should, whenever possible, be resolved against such exercise").

[3] Act of April 7, 1975, 1975 Miss. Laws ch. 501, §§ 1-23 (codified at MISS. CODE ANN. §§ 13-1-201 to 243 (Supp. 1976)). *See generally* Pyle, Ott & Rumfelt, *Mississippi Rules of Discovery*, 46 MISS. L.J. 681 (1975).

The purpose of this article is to provide a guide for the Mississippi attorney in his practice before the Mississippi Supreme Court. Hopefully, it will more fully illuminate the existing appellate path and define more exactly the edges of the quagmire into which those persons traditionally referred to as "the unwary" too often fall. A review of the appellate process appropriately begins with an examination of the jurisdiction of the supreme court.

I. APPELLATE JURISDICTION

The Mississippi Constitution vests the judicial power of the state in a "Supreme Court and such other courts as are provided for in this constitution."[4] The constitution further provides that the supreme court shall have "such jurisdiction as properly belongs to a court of appeals."[5] The court has historically viewed the nature of its jurisdiction as a court of appeals as twofold: (1) jurisdiction to review and revise the judicial decisions and actions of inferior courts, and (2) quasi-original jurisdiction to protect its "dignity and decorum" and to give plenary effect to its revisory powers.[6] Apart from any statutory requirements,[7] however, for a cause or controversy to be subject to the supreme court's jurisdiction, it must first satisfy certain judicially created prerequisites.

A. Judicial Prerequisites to Review

1. Cause Must Be an Appeal

The matter brought before the court must be an appellate proceeding and not an original proceeding. As previously noted, the constitution grants the supreme court "such jurisdiction as properly belongs to a court of appeals."[8] This provision has been interpreted to mean that the court has only appellate jurisdiction to review the actions of a lower court,[9] that it has no original jurisdiction,[10] and that the legislature may not confer original jurisdiction upon the court.[11] Consequently, no original proceeding may be instituted in the court,[12] nor may the court conduct a trial de novo of the cause appealed.[13]

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[4] MISS. CONST. art. 6, § 144. The "other courts" include the circuit and chancery courts. *Id.* §§ 153-164.

[5] *Id.* § 146.

[6] Brown v. Sutton, 158 Miss. 78, 83, 121 So. 2d 835, 837 (1929); Illinois Cent. R.R. v. Dodd, 105 Miss. 23, 43, 61 So. 743, 745 (1913).

[7] See notes 51 through 58 and accompanying text *infra.*

[8] MISS. CONST. art. 6, § 146.

[9] Illinois Cent. R.R. v. Dodd, 105 Miss. 23, 43, 61 So. 743, 745 (1913); Brown v. Carraway, 47 Miss. 668, 670 (1873).

[10] Moore v. White, 161 Miss. 390, 394, 137 So. 99, 100 (1931); Planters' Ins. Co. v.

2. Appeal Must Be From an Inferior Court

The appeal must be from an order, judgment or decree rendered by an inferior court which was "clothed with judicial authority and acting in a judicial capacity."[14] Thus, there can be no direct appeal to the supreme court from the ruling of a purely administrative agency.[15] For this reason, the statutes require that an administrative ruling must be appealed to the circuit court or the chancery court before being taken to the supreme court.[16]

3. Jurisdiction of Inferior Court and Lack of Jurisdiction

The lower court must have possessed and exercised jurisdiction over the cause before the supreme court obtains jurisdiction to hear the appeal. As a general rule, the supreme court's jurisdiction is purely appellate and, therefore, derivative of the jurisdiction exercised in the lower court. Accordingly, if the lower court erroneously or mistakenly assumed

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Cramer, 47 Miss. 200, 206 (1872). *But see* Boydstun v. Perry, 249 So. 2d 661, 664 (Miss. 1971)(holding that the court has original jurisdiction of a petition for writ of mandamus to require a circuit court judge to set a case for trial).

[11] Yazoo & M.V.R.R. v. Wallace, 90 Miss. 609, 616, 43 So. 469, 471 (1907) (Whitfield, C.J., concurring). The principle applies as well to petitions for writs of extraordinary relief such as a writ of habeas corpus pending appeal granted by supreme court justices. Thus, although it is statutorily provided that a justice of the supreme court may grant remedial writs, MISS. CODE ANN. § 9-1-19 (1972), the court requires that the petition seeking the writ first be presented to a lower court. MISS. SUP. CT. R. 32, app. I *infra*; *see* Masonite Corp. v. International Woodworkers, 202 So. 2d 41, 42 (Miss. 1967) (supreme court has authority to issue writ of supersedeas only if application has already been made to the chancellor).

[12] State *ex rel.* Herring v. Cox, 285 So. 2d 462, 463 (Miss. 1973); State v. Keeton, 176 Miss. 540, 545, 169 So. 760, 762 (1936).

[13] Mississippi State Tax Comm'n v. Mississippi-Alabama State Fair, 222 So. 2d 664, 667 (Miss. 1969), *cert. denied*, 396 U.S. 940 (1970); V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 673, at 740 (2d ed. 1950). Although the court is empowered by MISS. CODE ANN. § 9-3-37 (1972) to try and determine all issues of fact arising out of the appeal, this provision does not confer original jurisdiction on the court. Windom v. State, 192 So. 2d 689, 692 (Miss. 1966); State v. Keeton, 176 Miss. 590, 595, 169 So. 760, 762 (1936).

[14] Illinois Cent. R.R. v. Dodd, 105 Miss. 23, 44, 61 So. 743, 744 (1913) (citation omitted).

[15] *Id.* at 43, 61 So. at 745.

[16] *See, e.g.*, MISS. CODE ANN. § 27-35-163 (1972) (appeals from State Tax Commission to circuit court); *id.* § 27-55-23 (appeals from motor vehicle comptroller to chancery court); *id.* § 53-1-39 (appeals from Oil and Gas Board to circuit court).

original or appellate jurisdiction of a cause over which it in fact did not have jurisdiction,[17] or declined to exercise jurisdiction which it did have,[18] the supreme court is without jurisdiction to rule on the substance of the appeal and the cause must be reversed and dismissed for lack of jurisdiction. Section 147 of the Mississippi Constitution[19] does offer some relief from jurisdictional defects. An appeal from a civil cause originally instituted in the circuit court or the chancery court cannot be reversed by the supreme court solely because the chancery court erroneously assumed jurisdiction over a suit at law or because the circuit court mistakenly assumed jurisdiction over an equitable action.[20] Section 147 grants the supreme court jurisdiction to rule on the substance of such a case on appeal despite the fact that the chancery or circuit court did not technically have original jurisdiction.[21]

Section 147 does not, however, apply in three types of cases. First, if the cause of action is strictly statutory and the circuit court or chancery court has no statutory jurisdiction over the matter, section 147 will not cure the jurisdictional defect. Only a mistaken or erroneous assumption of jurisdiction is cured by section 147 and the supreme court categorizes any other assumptions as a usurpation of the jurisdiction of another court.[22] Second, section 147 applies only to a lower court's mistaken assumption of *original* jurisdiction. Thus, if the cause was erroneously appealed to the circuit or chancery court from an inferior court or an administrative agency, section 147 does not apply and the supreme court will reverse and dismiss for lack of jurisdiction.[23] Finally, section 147 applies only to civil cases. If the chancery court entertains a criminal proceeding, the supreme court presumably will pass over the merits of the appeal and reverse and dismiss the cause.[24]

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[17] Horton v. White, 254 So. 2d 188, 191 (Miss. 1971) (county court was without jurisdiction where amount in controversy was in excess of $10,000); Ainsworth v. Blakeney, 227 Miss. 544, 546, 86 So. 2d 501, 502 (1956) (circuit court erroneously assumed jurisdiction and therefore supreme court had no jurisdiction of the appeal).

[18] Miller v. White, 160 Miss. 32, 40, 133 So. 144, 146 (1931) (chancery court erroneously declined to exercise jurisdiction leaving supreme court powerless to render judgment).

[19] MISS. CONST. art. 6, § 147 provides:

> No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction; but if the Supreme Court shall find error in the proceedings other than as to jurisdiction, and it shall be necessary to remand the case, the Supreme Court may remand it to that court which, in its opinion, can best determine the controversy.

[20] *Id.* The statutory counterpart of this provision, MISS. CODE ANN. § 11-3-9 (1972), purports to cure *all* jurisdictional errors. The statute has, however, been ignored by the supreme court.

[21] Matthews v. Thompson, 231 Miss. 258, 291, 95 So. 2d 438, 452 (1957) (wrongful death suit in chancery court); Cazeneuve v. Curell, 70 Miss. 521, 525, 13 So. 32, 33 (1893) (action in trespass in chancery court).

[22] R.H. Green Wholesale Co. v. Hall, 184 Miss. 296, 300-01, 185 So. 807, 807-08 (1939) (plaintiffs are not allowed to aggregate separate claims which "are in the law separate and distinct" to meet the circuit court's jurisdictional amount requirement; if the circuit court assumes such jurisdiction its judgment will be reversed and dismissed); Mobile, J. & K.C.R.R. v. Hitt, 99 Miss. 679, 682, 55 So. 484, 485 (1911) (suit for damages in circuit

4. Standing

The appeal itself must involve a present controversy[25] between competing parties[26] who have standing to maintain the appeal and an active interest[27] in the final outcome of the case. Consequently, the court will not consider moot or hypothetical questions,[28] render advisory opinions,[29] or hear an appeal after the appellant's interest has terminated[30] or by a party who otherwise lacks standing to appeal.[31]

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court not permitted where the amount demanded did not exceed the required $200); Board of Levee Comm'rs v. Brooks, 76 Miss. 635, 641, 25 So. 358, 359 (1899) (condemnation hearing in circuit court).

[23] Rogers v. City of Hattiesburg, 99 Miss. 639, 643, 55 So. 481, 482 (1911) (appeal from city police justice to circuit court).

[24] It is reassuring to note that no reported cases were found in which the supreme court was confronted with a criminal prosecution that was instituted in chancery court.

[25] Miss. Code Ann. § 9-3-9 (1972); *see, e.g., Ex parte* Castle, 248 Miss. 159, 164, 159 So. 2d 81, 83 (1963).

[26] *See* Miss. Code Ann. § 11-51-3 (1972).

[27] *See In re* Porter, 210 So. 2d 773, 776 (Miss. 1968) (appellant's interest in estate ceased when the power of attorney-in-fact given to him was revoked by the death of his principal); Insured Sav. & Loan Ass'n v. State, 242 Miss. 547, 555, 135 So. 2d 703, 706 (1961) (interest of savings and loan association ceased when chancery court injunction restraining it from doing business had been abrogated).

[28] *Ex parte* Castle, 248 Miss. 159, 165, 159 So. 2d 81, 83 (1963) (question of removing deputy sheriff was moot since sheriff had validly discharged him); Insured Sav. & Loan Ass'n v. State, 242 Miss. 547, 555, 135 So. 2d 703, 706 (1961) (question of whether savings and loan association could do business was moot since trial court subsequently permitted it to do business).

[29] *See* Bridges v. Texaco, Inc., 242 Miss. 705, 715, 136 So. 2d 595, 599 (1962) (court declined to address questions not before the trial court when directed verdict was entered since result would be an advisory opinion); White v. Franklin, 165 Miss. 729, 731, 140 So. 876, 876 (1932) (advisory opinion not issued as it would not be binding on any party to the litigation). *But cf.*, Sartin v. Barlow, 196 Miss. 159, 169-70, 16 So. 2d 372, 376 (1944) (moot issue involving an election contest would be considered when failure to declare and enforce a rule for future conduct would be detrimental to the public interest).

[30] See note 27 *supra.*

[31] *See, e.g.,* House v. Roberts, 254 So. 2d 904, 906 (Miss. 1971) (executor in his fiduciary capacity may not appeal where judgment appealed from affects only the rights of beneficiaries); *In re* Porter, 210 So. 2d 773, 777 (Miss. 1968) (amicus curiae may not appeal); Jones v. Cashin, 133 Miss. 585, 591, 98 So. 98, 99 (1923) (same).

B. Exercise of Jurisdiction

1. Jurisdiction to Review and Revise

When the judicially-imposed prerequisites are present and the court has subject matter jurisdiction, the supreme court will assume jurisdiction and review the lower court's decision or order to determine whether any error of law was committed and whether the facts properly in evidence are sufficient to sustain the jury's verdict or the court's holding.[32] Factually, the supreme court is confined to the record of the transcript[33] or the stipulation of facts.[34] The court cannot hear new evidence[35] nor will it consider issues other than those raised in and passed upon by the lower court.[36] After reviewing the case, the court's revisory powers permit it to affirm or reverse in whole or in part,[37] reverse and remand with directions,[38] reverse and remand for a new trial,[39] reverse and render,[40] or affirm upon condition of additur or remittitur.[41]

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[32] Dickens v. State, 208 Miss. 69, 90, 43 So. 2d 366, 373 (1949).

[33] Mississippi State Tax Comm'n v. Mississippi-Alabama State Fair, 222 So. 2d 664, 667 (Miss. 1969).

[34] Horn v. State, 139 Miss. 574, 578, 104 So. 452, 452 (1925) (stipulation of facts in lower court).

[35] *See, e.g.*, Jenkins v. Barber, 85 Miss. 666, 671, 38 So. 36, 37 (1905) (record may not be supplemented by affidavit). See text accompanying note 13 *supra*. The supreme court is permitted, however, to try and determine all issues of fact arising out of the appeal itself. MISS. CODE ANN. § 9-3-37 (1972).

[36] Seaney v. Seaney, 218 So. 2d 5, 7 (Miss. 1969) (affidavits not admitted in trial court may not be considered on appeal); Burkett v. Peoples Bank, 225 Miss. 291, 303, 83 So. 2d 763, 763 (1955) (supreme court could not adjudicate issues between judgment debtor and appellant not presented in lower court); Beard v. Stanley, 205 Miss. 723, 735, 39 So. 2d 317, 321 (1949) (supreme court expressed no opinion on appellant's purchase of over 160 acres of public land in one year since the issue was not considered by the trial court).

[37] MISS. CODE ANN. § 11-3-37 (1972) (court may affirm as to some appellants, reverse as to others); *id.* § 11-3-39 (judgment for property and damages may be affirmed as to the property and reversed as to damages). Section 11-3-39 applies only to judgments for property. There is no general statute which allows partial reversal of a judgment at law. A judgment at law is rendered as to the entire cause; therefore, any appeal of the cause and subsequent reversal goes to the whole judgment and not merely a part of it. Adams v. Carter, 92 Miss. 579, 593, 47 So. 409, 411 (1908). MISS. CODE ANN. § 11-3-35 (1972) and *id.* § 99-35-143 generally prohibit reversal on the ground of non-jurisdictional defects in the transcript of the record. Section 11-3-37 addresses itself to multiple appellants and prohibits reversal as to any one appellant if there is error only as to another appellant.

[38] Biglane Operating Co. v. Brown, 322 So. 2d 470, 471 (Miss. 1975) (remand to decide specific questions); Pearson v. Korzekwa, 278 So. 2d 419, 419 (Miss. 1973) (remand for further proof).

[39] Hinton v. McKee, 329 So. 2d 519, 521 (Miss. 1976) (case remanded for a new trial before a new jury); MISS. CODE ANN. § 11-3-39 (1972) (new trial as to damages where judgment for property affirmed); MISS. CODE ANN. § 11-7-213 (1972) (no more than two trials may be granted to the same party in any single case; applies only to circuit court); MISS. SUP. CT. R. 12-13, app. I *infra* (a new trial will be granted only on those issues reversed by the supreme court). *See generally* MISS. CODE ANN. § 9-3-9 (1972).

2. Quasi-Original Jurisdiction

The "quasi-original" jurisdiction of the court is better defined as jurisdiction in aid of its appellate powers. Specifically, the supreme court may exercise any power that will aid in the effective exercise of its jurisdiction to review and revise. This primarily enables the court to hear and resolve all motions, issues of fact and other controversies arising out of the appeal itself.[42] Additionally, the court has power to punish contempt[43] and require the production of all records necessary for the proper treatment of the cause on appeal.[44]

II. SUBJECT MATTER JURISDICTION

Unlike the United States Constitution, which vests in the Supreme Court of the United States specific subject matter jurisdiction and exclusive subject matter jurisdiction, *i.e.* both original and appellate jurisdiction,[45] the Mississippi Constitution simply provides the Mississippi Supreme Court with "such jurisdiction as properly belongs to a court of appeals." No express grant of specific or exclusive subject matter jurisdiction is made,[46] nor does any constitutional provision guarantee any litigant a right to appeal, much less the right to appeal a specific type of controversy, to the supreme court.[47] Thus, as might be expected, the court has recognized not only that an appeal is not a matter of right, but that appeals may be taken only in those classes of cases and to those courts as provided by statute.[48] Accordingly, the subject matter jurisdiction of the supreme court is solely within the province of the legislature.[49]

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[40] *See, e.g.*, Hartford Steam Boiler Inspection & Ins. Co. v. Casper, 341 So. 2d 655, 668 (Miss. 1977) (evidence would not produce a different result); State Farm Mut. Auto Ins. Co. v. Stewart, 288 So. 2d 723, 725 (Miss. 1974) (no jury issue created); National Foods v. Freidrich, 173 Miss. 717, 724, 163 So. 126, 127-28 (1935) (no facts which would support verdict for appellee); Hairston v. Montgomery, 102 Miss. 364, 374, 59 So. 793, 744 (1912) (facts undisputed).

[41] MISS. CODE ANN. § 11-1-55 (Supp. 1976).

[42] *Id.* § 9-3-37 (1972); MISS. SUP. CT. R. 37, app. I *infra*.

[43] MISS. CODE ANN. § 9-1-17 (1972).

[44] *Id.* § 9-3-35; *see* Brown v. City of Water Valley, 319 So. 2d 649, 651 (Miss. 1975) (certiorari requiring court reporter to transcribe notes).

[45] U.S. CONST. art. III, § 2, cl. 2 provides:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[46] MISS. CONST. art. 6, § 146.

[47] There are two "exceptions" to this statement. First, MISS. CONST. art. 6, § 171 guarantees the right to appeal from the justice court, but leaves the designation of the appellate court to the legislature. Accordingly, the legislature has restricted the right to appeal to the supreme court from cases originating in the justice court. MISS. CODE ANN. §§ 11-51-81, -91 (1972). Second, the supreme court has declared by judicial fiat that there

The legislature's exclusive powers include not only the power to designate the scope of the supreme court's subject matter jurisdiction and those courts from which an appeal may be taken to the supreme court, but also the manner and the form that the appeal must follow.[50] While cognizant of this exclusive legislative power over its subject matter jurisdiction, the court has, however, declared that its jurisdiction must remain exclusively appellate,[51] thereby foreclosing any legislative power to confer original jurisdiction upon the supreme court.[52]

The general jurisdictional statute reiterates the principle that the supreme court shall have "such jurisdiction as properly belongs to a court of appeals" and further provides that the court's jurisdiction extends to "all manner of pleas, plaints, motions, causes, and controversies, civil and criminal . . . which shall be cognizable in said court."[53] Additionally, numerous other statutes individually confer specific subject matter jurisdiction upon the court, thereby making the respective cause "cognizable."[54] If these specific statutes fail to designate the method of appeal, an appeal from the judgment or an order must be taken under the general "final judgment" statute.[55] In civil causes for which there is no express statutory right to appeal to the supreme court,

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is an automatic, absolute, presumably constitutional, right to appeal from a sentence of death. Jackson v. State, 337 So. 2d 1242, 1255 (Miss. 1976).

[48] McMahon v. Milam Mfg. Co., 237 Miss. 676, 679-80, 115 So. 2d 328, 330-31 (1959), *rev'd per curiam on other grounds,* 368 U.S. 7 (1961) (appeal lies only where provided for by statute); Craig v. Barber Bros. Contracting Co., 190 Miss. 182, 187-88, 199 So. 270, 271-72 (1940) (same); Jones v. Cashin, 133 Miss. 585, 590, 98 So. 98, 100 (1923) (same). *See also* Drummond v. State, 184 Miss. 738, 746-47, 185 So. 207, 208 (1938) (legislature has plenary power over appeals).

[49] Drummond v. State, 184 Miss. 738, 746-47, 185 So. 207, 208 (1938).

[50] Miss. Code Ann. § 9-3-9 (1972); *id.* §§ 11-51-1 to 73 (1972 & Supp. 1976).

[51] *See* Illinois Cent. R.R. v. Dodd, 105 Miss. 23, 44-47, 61 So. 743, 745 (1913) ("The jurisdiction of the circuit court is very different from that of this court."); Brown v. Carraway, 47 Miss. 668, 670 (1873)("[C]onstitution meant to confer upon [the supreme court] exclusively revisory and appellate jurisdiction . . . .").

[52] *See* Yazoo & M.V.R.R. v. Wallace, 90 Miss. 609, 614-15, 43 So. 469, 470 (1907) (holding a statute which effectively forced appeals from the circuit court to be unconstitutional as an attempt to confer original jurisdiction on the court).

[53] Miss. Code Ann. § 9-3-9 (1972).

[54] *See, e.g., id.* § 11-27-29 (eminent domain suits); *id.* § 11-43-53 (habeas corpus); *id.* § 27-7-73 (income tax); *id.* §31-13-5 (bond issues).

[55] *Id.* § 11-51-3.

the court has held that an appeal will lie under the general "final judgment" statute, provided that the circuit or chancery court has rendered a final judgment or an appropriate interlocutory decree or order.[56] The final judgment statute will not, however, aid an appeal in a criminal cause as the statute expressly applies only to civil cases. Thus, in the absence of a specific jurisdictional statute, the supreme court does not have jurisdiction to hear an appeal from a ruling or judgment rendered in a criminal proceeding.[57] Yet, regardless of whether jurisdiction and the right to appeal lie under a specific statute or under the final judgment statute, a final judgment or an appropriate interlocutory decree or order must have first been rendered.[58]

III. LACK OF SUBJECT MATTER JURISDICTION

Although a cause may be cognizable in the supreme court, the court will sometimes decline to assume jurisdiction because of a jurisdictional defect. Jurisdiction is declined in such cases not because of a lack of jurisdiction over the subject matter, but because of some "manufactured" defect such as the presentation of a moot question, the lower court's erroneous assumption of jurisdiction or a failure to secure a final judgment or appropriate interlocutory decree. Thus, when the phrase "lack of subject matter jurisdiction" is employed, reference is made to those classes of cases or subject matters over which the supreme court will never have jurisdiction either because of legislative mandate or judicial fiat. In the federal domain, the United States Supreme Court has referred to such cases as "non-justiciable" for failure to satisfy the "cases and controversies" clause of the Constitution.[59]

In only one type of case, however, has the legislature expressly restricted the supreme court's subject matter jurisdiction. By statute, there can be no appeal to the supreme court from any case, civil or criminal, which originated in a justice court, municipal court or police court which was subsequently appealed to the county court and then to the circuit court, unless the case presents a constitutional question and the circuit judge or a supreme court justice allows the appeal.[60] The practical effect of the statute is to restrict appeals from misdemeanor proceedings and civil actions involving $500 or less in which there is no certified constitutional issue. The statute can be avoided, however, by initially transferring the cause to the county court.[61]

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[56] *See* Mississippi Real Estate Comm'n v. Ryan, 241 So. 2d 667, 668 (Miss. 1970) (permitting such an appeal by the Mississippi Real Estate Commission from a final judgment of the circuit court); *cf.* Jones v. Cashin, 133 Miss. 585, 590, 98 So. 98, 99 (1923) (appeal must be taken by a party to the final judgment).

[57] MISS. CODE ANN. §§ 99-35-101, -103 (1972); State v. Sisk, 209 Miss. 174, 177-78, 46 So. 2d 191, 191 (1950) (statutes do not authorize the state or a municipality to appeal from a judgment discharging a defendant on the ground of insufficient evidence); City of Water Valley v. Davis, 73 Miss. 521, 521-22, 19 So. 235, 235 (1896) (state or municipality may appeal only where specifically provided for by statute).

[58] MISS. CODE ANN. §§ 11-51-3, -7 (1972); *e.g.*, Roach v. Black Creek Drainage Dist., 206 Miss. 794, 795-96, 41 So. 2d 5, 5-6 (1949) (no appeal is allowed absent rendition of a final judgment).

[59] Flast v. Cohen, 392 U.S. 83, 95-96 (1968).

The supreme court itself has declared that its jurisdiction cannot extend to three types of cases. First, the court has deemed itself to be without jurisdiction to hear purely political party matters.[62] Second, it is without jurisdiction to hear ecclesiastical questions.[63] Finally, the court will not hear a direct appeal from an administrative agency[64] since the court's appellate jurisdiction is limited to judgments and decrees of courts "clothed with judicial authority and acting in a judicial capacity."[65]

IV. JURISDICTIONAL AMOUNT

A particular jurisdictional amount in controversy is required for appeal purposes only in those civil cases which originate in the justice court. Section 11-51-91 prohibits appeals to the supreme court from any civil cause which was instituted in the justice court unless the amount in controversy exceeds fifty dollars.[66] Where the defendant seeks to appeal such a judgment to the supreme court, the amount in controversy is measured by the amount of the judgment rendered in the circuit court.[67] Where the plaintiff seeks to appeal, the amount is determined by the difference between the amount demanded and the judgment rendered in the circuit court.[68] The difference must exceed fifty dollars in order for the plaintiff to appeal.[69] In appeals by either the plaintiff or the defendant, the jurisdictional amount may be supplied by the counterclaim,[70] but may not in either situation include costs or interest on the judgment.[71] Practically, as one might expect in this period of inflation, the fifty-dollar jurisdictional requirement presents little, if any, problem to the prospective appellant.

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[60] MISS. CODE ANN. § 11-51-81 (1972).

[61] Peebles v. Miles, 189 Miss. 623, 627, 198 So. 29, 30 (1940) (transfer from justice court to county court by agreement of parties allowed appeal from county court to supreme court since there was no perfected appeal from justice court).

[62] Wood v. State, 169 Miss. 790, 819, 142 So. 747, 752 (1932) (supreme court could not issue mandamus to prohibit Secretary of State from drafting ballot).

[63] Blue v. Jones, 230 So. 2d 569, 569-70 (Miss. 1970) (determination of proper trustees of church was an ecclesiastical question for the congregation and not for the court); Conic v. Cobins, 208 Miss. 203, 217, 44 So. 2d 52, 55 (1950) (civil courts have no jurisdiction to decide who is or ought to be presiding bishop of diocese); Grantham v. Humpkins, 185 Miss. 496, 499-500, 188 So. 313, 313-14 (1939) (church authorities' selection of pastor was final). *But cf.*, Mt. Helm Baptist Church v. Jones, 79 Miss. 488, 502, 30 So. 714, 716 (1901) (court has jurisdiction to adjudicate title to church property even though issue arose out of division of congregation over religious beliefs).

[64] Illinois Cent. R.R. v. Dodd, 105 Miss. 23, 47, 61 So. 743, 744-45 (1913) (legislature could not authorize direct appeals from railroad commission to supreme court since commission was merely an administrative agency).

[65] *Id.* at 43, 61 So. at 743 (1913).

[66] MISS. CODE ANN. § 11-51-91 (1972). Jurisdictional amount for appeal purposes should not be confused with those statutes which require a certain jurisdictional amount to invoke original jurisdiction over the cause in a lower court. In this latter class of cases, the supreme court often dismisses an appeal not because of a lack of jurisdictional amount to appeal, but because there was by statute no jurisdiction in the court of original jurisdiction. Since jurisdictional amount in the inferior court is statutory, MISS. CONST. art. 6, § 147 does not cure the jurisdictional defect. *See* Horton v. White, 254 So. 2d 188, 189-91

V. PARTIES TO THE APPEAL

Section 11-51-3 grants a right of appeal to the supreme court only to *parties,* their privies or personal representatives.[72] Mere *persons* who are directly interested in or who will be directly affected by the outcome, but who were not original parties to the cause, may not perfect an appeal to the court.[73] Consequently, there can be no appeal by one who is merely amicus curiae.[74]

Any one or more of the parties to a judgment or decree[75] possessing an active interest[76] in the cause may appeal to the supreme court either

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(Miss. 1971) (county court was without jurisdiction to adjudicate defendant's $84,000 counterclaim).

[67] Gardner v. Bookout, 200 Miss. 158, 159-60, 26 So. 2d 343, 343 (1946) (interest not included in determining amount).

[68] MISS. CODE ANN. § 11-51-91 (1972).

[69] Home Ins. Co. v. McFarland, 142 Miss. 555, 557-58, 107 So. 383, 383 (1926); MISS. CODE ANN. § 11-51-91 (1972).

[70] Garner v. Broom, 161 Miss. 734, 741, 138 So. 336, 337 (1931).

[71] James v. Williams Furniture Co., 161 Miss. 358, 360-61, 137 So. 101, 102 (1931).

[72] MISS. CODE ANN. § 11-51-3 (1972).

[73] Ridgway v. Scott, 237 Miss. 400, 404-05, 114 So. 2d 844, 845 (1959) (defendant in action filed by guardian could not appeal guardian's appointment since he was not a party to guardianship proceedings); Hunter v. Stanford, 198 Miss. 299, 301, 22 So. 2d 166, 168 (1945) (appeal dismissed where proposed appellants were not parties to proceeding sought to be reviewed).

[74] Jones v. Cashin, 133 Miss. 585, 591, 98 So. 98, 99 (1923).

[75] MISS. CODE ANN. §§ 11-51-3, -17 (1972).

[76] In Insured Sav. & Loan Ass'n v. State, 242 Miss. 547, 135 So. 2d 703 (1961), the court dismissed the association's appeal on mootness grounds. In the process, the court pointed out several situations in which an appeal could not be maintained including: (1) where a party to an appeal has lost his interest in the subject matter of the appeal; (2) where the cause on appeal relates to questions involving rights which have ceased to exist; (3) where the appeal is for the purpose of settling abstract or academic questions; and, as in the instant case, (4) where issues presented on appeal have become moot. *Id.* at 554-57, 135 So. 2d at 708.

as an appellant on a direct appeal[77] or as a cross-appellant on a cross-appeal.[78] There is no requirement that a party obtain the consent of his fellow parties in order to appeal.[79]

A. *Non-Joining Parties*

The clerk of the supreme court will issue a summons for those parties who do not join in perfecting the appeal notifying them to join the appeal at the return term for the appeal.[80] Although a party cannot be forced to join in the appeal,[81] an election by that party not to join the other parties constitutes a waiver of that party's right to appeal.[82] The appellant should thus ensure that a summons does in fact issue and is served on his fellow parties to avoid a dismissal or stay of the appeal by the supreme court.[83] Similarly, the appellee should verify that a summons was issued and was served on each non-joining opposing party to avoid the possibility of a split appeal at a later date.

B. *Death of a Party*

If a party-plaintiff or a party-defendant dies after a judgment in the lower court, but prior to perfecting an appeal to the supreme court, the right of appeal will survive in or against his legal representatives.[84] Should an appellant or appellee die after the appeal has been perfected but prior to a decision by the supreme court, a suggestion of death and motion to revive must be filed, thereby reviving the cause by and in the name of the executor or administrator of the decedent's estate.[85] Revival must take place within two terms of court after the party's death has been noted[86] or the appeal will be dismissed.[87] If a party dies after perfection of the appeal but prior to a decision by the court, and the court then renders its decision, a petition for rehearing should be filed setting forth the death of the party.[88] The supreme court will then vacate its decision and judgment and remand the cause to its docket pending revival by or against the decedent's legal representative.[89]

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[77] Miss. Code Ann. § 11-51-3 (1972). *See generally* section XIII. *infra.*

[78] *See* Twin States Ins. Co. v. Holcomb, 196 So. 2d 93, 94 (Miss. 1967) (cross-appeal dismissed for failure to file appeal bond); Duckworth v. Allis-Chalmers Mfg. Co., 247 Miss. 198, 206, 150 So. 2d 163, 166 (1963) (same).

[79] Wilkinson v. Love, 149 Miss. 523, 532-33, 115 So. 707, 710 (1928).

[80] Miss. Code Ann. § 11-51-17 (1972).

[81] *Id.*

[82] *Id.*; *see* United States Fidelity & Guar. Co. v. Rice, 184 Miss. 423, 448-49, 186 So. 620, 620 (1939) (sheriff who declined to join appeal after summons had no right to appeal when lower court decree was reversed as to appellant yet remained in effect as to him).

[83] United States Fidelity & Guar. Co. v. Jackson, 123 Miss. 676, 692, 86 So. 456, 457 (1920) (appeal was improperly taken when joint judgment defendant not summoned); Tardy v. Rosenstock, 118 Miss. 720, 721, 80 So. 1, 1 (1918) (failure to summon one party to join in appeal resulted in remand of appeal to docket for compliance within 30 days or dismissal); Gibson v. Carr, 91 Miss. 773, 775, 45 So. 864, 864 (1908) (appeal wherein one party was not summoned could not be maintained).

[84] Russell v. McCrae, 169 Miss. 169, 176-78, 152 So. 826, 827-28 (1934) (death of plaintiff after final judgment but before appeal taken did not abate state's right, for use of another, to proceed with appeal); Miss. Code Ann. § 11-7-29 (1972) (judgment rendered against two or more defendants, one of whom dies, is still effective against survivor and legal representatives of deceased).

VI. APPEALS FROM FINAL JUDGMENTS

Since the abolition of the writ of error in Mississippi,[90] the manner or method of appeal to the supreme court has been regulated by statute.[91] Because Mississippi is without an intermediate court of appeals, these statutes embrace the principle of a qualified right to a direct appeal. The most significant aspect of this direct appeal system is the stringency of those rules and statutes governing the appealability of a lower court's order or decree. Specifically, these requirements are geared to ensuring the "finality" of the order appealed and to discourage multiple or fragmented appeals.

Subject to a limited number of statutory exceptions,[92] an appeal in a civil cause may be taken only from a final judgment of a circuit court or a final decree of a chancery court unless the judgment or decree was rendered by confession or consent.[93] Similarly, a criminal defendant may appeal from a judgment of the circuit court or the county court provided no guilty plea to the offense charged has been entered.[94] Additionally, in certain specified instances the state or a municipality may appeal from a judgment rendered by the circuit court or the county court in a criminal case.[95] In civil matters, of course, the state is free to appeal as any other litigant under the statute.[96]

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[85] Jefferson v. Pinson, 219 Miss. 427, 436-37, 69 So. 2d 234, 238 (1954) (death of appellant during pendency of appeal did not prevent cause from being revived by executor or legal representative); MISS. CODE ANN. § 11-3-17 (1972).

[86] MISS. CODE ANN. § 11-3-17 (1972).

[87] Muse v. Barrier, 57 So. 2d 567, 569 (Miss. 1952).

[88] Anderson v. Anderson, 239 Miss. 789, 822-23, 122 So. 2d 86, 86-87 (1960); Chapman v. White Sewing Mach. Co., 77 Miss. 890, 891, 28 So. 749, 750 (1900).

[89] *Id.*

[90] MISS. CODE ANN. § 11-51-1 (1972).

[91] *See generally id.* §§ 11-51-1 to 73.

[92] *E.g.*, *id.* § 11-1-57 (interlocutory appeals from chancery court); *id.* § 11-7-213 (interlocutory appeal from circuit court).

[93] *Id.* §§ 9-3-9, 11-51-3. The principal exceptions to this rule are statutes allowing certain interlocutory appeals from the chancery court. See section VII. *A. infra.*

[94] MISS. CODE ANN. § 11-35-101 (1972). However, the criminal defendant who pleaded guilty to an offense may effectively obtain a review of his conviction by pursuing a writ of error *coram nobis*. *Id.* § 99-35-145; MISS. SUP. CT. R. 38, app. I *infra; see* Yates v. State, 342 So. 2d 312, 316 (Miss. 1977) (petition for writ of error *coram nobis* denied); Nelson v. Tullos, 323 So. 2d 539, 546 (Miss. 1975) (petition for writ of error *coram nobis* granted).

For appeal purposes, there is no final judgment until the trial court has entered its judgment or, in a criminal case, its judgment and sentence.[97] Accordingly, the trial court's judgment will not be considered final until the judge has ruled on any seasonable postjudgment motions.[98] However, if the postjudgment motion results in an order for a new trial, no final judgment exists[99] and an interlocutory appeal may not be taken unless the sole ground for the new trial was the excessiveness or the inadequacy of the damage award in a civil case.[100]

The court has construed the finality requirement to mean that a judgment is final for appeal purposes only when the trial court has ruled on all of the issues[101] pertaining to all of the parties involved.[102] For

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Habeas corpus is available in Mississippi as a post-conviction remedy only if the defendant was convicted under an invalid statute or by a court which lacked jurisdiction. Nelson v. Tullos, 323 So. 2d 539, 542-43 (Miss. 1975).

[95] MISS. CODE ANN. § 99-35-103 (1972) provides for appeals by the state or municipality:

> (a) From a judgment sustaining a demurrer to, or a motion to quash an indictment, or an affidavit charging crime; . . .
>
> (b) From a judgment actually acquitting the defendant where a question of law has been decided adversely to the state or municipality; . . .
>
> (c) From a ruling adverse to the state or municipality in every case in which the defendant is convicted and prosecutes an appeal; and in such case the whole record shall be carried before the supreme court on the direct appeal, and the case shall be treated as if a cross appeal had been formally prosecuted by the state. All questions of law thus presented shall be decided by the supreme court.

The appeal may be directly from the county court in a felony case which was transferred to that court from the circuit court. *Id.* § 11-51-79.

[96] State v. Burrill, 312 So. 2d 1, 3 (Miss. 1975); MISS. CODE ANN. § 11-51-3 (1972).

[97] Lang v. State, 238 Miss. 677, 680, 119 So. 2d 608, 609 (1960) (no final judgment in criminal cause until judgment and sentence of the court is rendered).

[98] *Compare* Johnson v. Mississippi Power Co., 189 Miss. 67, 71, 196 So. 642, 643 (1940) (appeal dismissed since filed after 6-month limitation dating from issuance of decree had passed) *with* Moore v. Montgomery Ward & Co., 171 Miss. 420, 422-23, 156 So. 875, 875-76 (1934) (appeal allowed when final more than six months after initial judgment but less than six months after seasonable motion for new trial was overruled, thereby making judgment final).

[99] Standard Prod. Inc. v. Patterson, 317 So. 2d 376, 379 (Miss. 1975).

[100] Byrd v. Sinclair Oil & Ref. Co., 240 So. 2d 623, 625 (Miss. 1970) (inadequacy or excessiveness of damages must be sole ground); MISS. CODE ANN. § 11-7-213 (1972).

[101] Estate of Rosamond, 326 So. 2d 465, 465 (Miss. 1976) (appeal dismissed where some issues left unresolved); State Tax Comm'n v. Clinton, 267 So. 2d 312, 314 (Miss. 1972) (appeal dismissed because no final judgment as to all issues); V. GRIFFITH, *supra* note 13, at § 609.

[102] American Empire Life Ins. Co. v. Skil-Craft Builders, Inc., 291 So. 2d 735, 735 (Miss. 1974) (motion to dismiss sustained as judgment not final to all parties).

example, in a case involving multiple parties-plaintiff or defendant, there can be no final judgment until the judgment is final as to all of the parties to the litigation.[103] If the declaration alleges multiple grounds for relief,[104] or if the answer sets forth a number of defenses,[105] there can be no final judgment until an order disposing of all of the counts or defenses has been entered.[106] Similarly, a non-suit or voluntary dismissal taken by the plaintiff without prejudice is not appealable because it adjudicates nothing and does not resolve any of the issues in the lawsuit.[107] Nor is an order simultaneously sustaining a demurrer and transferring the cause to the circuit court or, if an order of the circuit court, to the chancery court, considered final for purposes of an appeal.[108] In contrast, a circuit court order requiring that a court reporter be present to transcribe grand jury proceedings has been held to be appealable as a final order because all issues raised by the motion were concluded and no further proceedings could take place that would not affect the issue appealed.[109] Likewise, an involuntary dismissal by the trial court is also a final judgment regardless of whether it was made without prejudice.[110]

A. *The Finality of an Order Sustaining a Demurrer*

An order sustaining a demurrer and dismissing the cause is, of course, a final judgment from which an appeal may be taken. However, an order which merely overrules a demurrer or which sustains a demurrer and requires only that the plaintiff amend his declaration, is not in itself a final judgment.[111] Nor is an order which sustains a demurrer as to less than all of the parties-plaintiff a final judgment for appeal purposes.[112] Additionally, where there are multiple parties-plaintiff and defendant and less than all of the defendants interpose a demurrer which is sustained as to less than all of the plaintiffs, there is still no final judgment until all of the matters at issue between all of the parties are decided by an order of the court or by the jury's verdict.[113] This is the rule despite the fact that a demurrer goes to the whole of the declaration[114] and, therefore, the judgment is final as to the specific parties-plaintiff. The illogic of this rule is further compounded by the fact that an interlocutory appeal from an order sustaining a demurrer as to less than all parties-plaintiff might be possible if the suit is in the chancery court,[115] while a suit in the circuit court offers no such possibility.[116]

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[103] *Id.*

[104] Miss. Code Ann. §§ 11-7-35, -36 (Supp. 1976) (allowing multiple grounds of relief).

[105] *Id.* § 11-7-59 (allowing multiple defenses).

[106] Bradley v. Holmes, 242 Miss. 247, 253, 134 So. 2d 494, 496 (1961) (plaintiff's appeal dismissed as premature when court dismissed one defendant and ordered new trial for other defendant since there was no final judgment as to all parties).

[107] State *ex rel.* Brown v. Poplarville Sawmill Co., 119 Miss. 432, 441-42, 81 So. 124, 127 (1919); Gulf & S.I.R.R. v. Williams, 109 Miss. 549, 553, 68 So. 776, 777 (1915).

[108] Morris v. Brown, 42 So. 2d 95, 95 (Miss. 1949) (en banc).

[109] State v. Burrill, 312 So. 2d 1, 2-3 (Miss. 1975).

[110] Solomon v. Continental Baking Co., 174 Miss. 890, 896-97, 165 So. 607, 608-09 (1936) (en banc).

[111] Pennyan v. Alexander, 226 Miss. 419, 421-22, 84 So. 2d 388, 388 (1956) (even though plaintiff stated that he would not further amend his declaration, order sustaining demurrer and allowing leave to amend not a final judgment). The order may, of course, subsequently become final. Miss. Code Ann. § 11-7-83 (1972).

[112] American Life Ins. Co. v. Skil-Craft Builders, Inc., 291 So. 2d 735, 735-36 (Miss. 1974).

If the trial court sustains a demurrer but also grants leave to amend, the order is not final for appeal purposes "unless a formal dismissal is made by the trial judge effective upon or after the expiration of the time to amend."[117] Thus, an order sustaining a demurrer and granting leave to amend with no further order effecting dismissal of the cause is not a final judgment from which an appeal will lie.[118] However, if the court sustains the demurrer and neither grants leave to amend nor enters a formal dismissal, the judgment becomes final at the end of that term of court and an appeal may be taken from the judgment.[119]

B. *The Failure or Refusal of the Lower Court to Render a Final Judgment*

The Code provides relief for those litigants who would otherwise be deprived of their appeal because the chancellor or the circuit judge either fails or refuses to render a final judgment. Although the lower court may take a matter "under advisement," section 11-1-17[120] provides that the trial court's failure to render a final decree within six months from the date the matter was taken under advisement or the date final briefs were submitted, whichever is later, allows any party to take an appeal in the same manner as though a final judgment had been rendered. This statute has been utilized most frequently to perfect appeals from the chancery court where it is commonplace for the chancellor to take a matter under advisement.[121]

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[113] *See id.* (decree sustaining demurrer to and dismissing bill of complaint on cross-bill, though final as to that party, is not appealable where unresolved issues remain as to other parties); Bradley v. Holmes, 242 Miss. 247, 253, 134 So. 2d 494, 496 (1961) (dismissed defendant could not appeal where trial was set for codefendant).

[114] L.J. Alford Lumber Co. v. Ragland, 106 Miss. 51, 52-53, 63 So. 338, 339 (1913) (chancellor erred in sustaining demurrer which went only to part of the declaration).

[115] See section VII. *A. infra.*

[116] See section VII. *B. infra.*

[117] Farned v. Aetna Cas. & Sur. Co., 263 So. 2d 790, 791 (Miss. 1972).

[118] *Id.*; Armstrong v. Moore, 112 Miss. 511, 515, 73 So. 566, 567 (1917) (appeal dismissed as interlocutory).

[119] Farned v. Aetna Cas. & Sur. Co., 263 So. 2d 790, 791 (Miss. 1972).

[120] MISS. CODE ANN. § 11-1-17 (1972).

VII. APPEALS FROM INTERLOCUTORY ORDERS OR DECREES

An interlocutory appeal is an immediate appeal from an order or decree entered prior to a final determination of all of the issues in the case and as to all of the parties. Thus, it is the order or decree itself which is interlocutory. An interlocutory order may be assigned as error on appeal and may be grounds for reversal.[122] The supreme court has no jurisdiction, however, to hear an appeal from any interlocutory order or decree until after a final judgment has been rendered unless an immediate appeal from the interlocutory order or decree is expressly provided by statute.[123]

A. *Interlocutory Appeals from Chancery Court*

Section 11-51-7 provides that an intelocutory appeal may be granted

> by the chancellor in term time, or in vacation, from any interlocutory order or decree [1] whereby money is required to be paid, or [2] the possession of property changed, or [3] when having sustained or overruled a demurrer or motion he may think an appeal proper in order to settle all the controlling principles involved in the cause, or [4] in exceptional cases to avoid expense and delay.[124]

Consequently, an interlocutory order or decree in the chancery court must satisfy at least one of the foregoing criteria to be appealable prior to a final judgment.[125] The statute has been strictly construed and, for all practical purposes, the court has allowed an interlocutory appeal from the chancery court only when the appeal will settle all controlling principles involved in the case or "in exceptional cases to avoid expense and delay."[126] Moreover, the court has not limited itself to the chancellor's findings and has not hesitated to dismiss an appeal as improvidently granted.[127] Nevertheless, the granting of an appeal under section 11-51-7 is entirely within the discretion of the chancellor.[128] If a request for an interlocutory appeal is denied by the chancellor, the movant's only immediate relief is to petition a justice of the supreme court, who may also allow the appeal.[129] In any event, there can be no interlocutory appeal unless an order permitting the appeal has been entered by either the chancellor or a justice of the supreme court.[130]

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[121] *See* Beall v. Beall, 310 So. 2d 706, 707 (Miss. 1975) (appeal from chancery court since no decree rendered after six months); Horton v. Horton, 301 So. 2d 305, 306 (Miss. 1974) (same). *See also* Riley v. Richardson, 258 So. 2d 419, 420 (Miss. 1972) (lower court lacked jurisdiction to render a decree after six months had elapsed from the time the matter was taken under advisement and an appeal had been taken under § 11-1-17).

[122] *Cf.* Hendrick v. Bridges, 211 So. 2d 544, 545 (Miss. 1968) (since lower court did not authorize appeal from interlocutory order, supreme court had no jurisdiction to hear appeal until final decree was entered).

[123] Seaney v. Seaney, 218 So. 2d 5, 6 (Miss. 1969) ("Appeals from interlocutory orders are not favored and are limited to [those cases categorized in § 11-51-7].").

[124] MISS. CODE ANN. § 11-51-7 (1972).

[125] Seaney v. Seaney, 218 So. 2d 5, 6 (Miss. 1969).

[126] Turner Lumber Co. v. Beckham, 277 So. 2d 110, 111 (Miss. 1973) (interlocutory

Depending upon compliance with the supersedeas statutes,[131] an appeal of the interlocutory order or decree may be granted with supersedeas[132] or without supersedeas.[133] The statutes do, however, provide that if the chancellor denies an application for supersedeas, the movant may apply to a justice of the supreme court who may allow the appeal to proceed with supersedeas.[134] The proper procedure is to file an application for interlocutory appeal to the supreme court and an appeal bond for costs within thirty days of the filing of the interlocutory decree.[135]

B. *Interlocutory Appeals from Circuit Court*

Although section 11-51-7 permits certain interlocutory appeals from the chancery court, it does not mention the circuit court. The supreme court, apparently employing the rule of *expressio unius est exclusio alterius,* has construed the statute as prohibiting interlocutory appeals from the circuit court.[136] Consequently, the only interlocutory appeal

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appeal granted to decide issues); Nelson v. Ethridge, 271 So. 2d 730, 731 (Miss. 1973) (appeal improperly granted since complex and unsolved facts would not allow determination of controlling issues); Calmes v. Weill, 216 So. 2d 418, 419 (Miss. 1968) (interlocutory appeal should be granted only when controlling issues can be settled or to avoid expense and delay).

[127] Calmes v. Weill, 216 So. 2d 418, 419-20 (Miss. 1968).

[128] First Nat'l Bank of Canton v. Poston, 140 Miss. 64, 76, 97 So. 882, 883 (1923); Miss. Code Ann. § 11-51-7 (1972).

[129] Miss. Code Ann. §§ 9-3-33, 11-51-7 (1972); *see* Nelms v. Brooks, 105 Miss. 74, 78, 61 So. 985, 986 (1913) (remand ordered on petition after denial of interlocutory appeal by chancellor).

[130] Estate of Rosamond, 326 So. 2d 465, 465 (Miss. 1976) (no order; appeal dismissed); Farrar v. Phares, 232 Miss. 391, 394, 99 So. 2d 594, 594 (1958) (same); Miss. Code Ann. § 11-51-7 (1972).

[131] Miss. Code Ann. §§ 11-51-7, -29, -31 (1972).

[132] *Id.* § 11-51-31.

[133] *Id.* § 11-51-29. *See also* section XIV. *infra.* It is thus conceivable that a case could continue to final judgment in the trial court while an interlocutory appeal is pursued in the supreme court. See note 252 *infra.*

[134] Miss. Code Ann. §§ 9-3-33, 11-51-43 (1972).

[135] *Id.* § 11-51-7; *see* Farrar v. Phares, 232 Miss. 391, 392, 99 So. 2d 594, 595 (1958).

[136] Miss. Code Ann. § 11-51-7 (1972), *construed in* State Tax Comm'n v. Clinton, 267

allowed from the circuit court is the statutory right to appeal from an order granting a new trial solely on the ground of the excessiveness or the inadequacy of the verdict.[137] If the order denied a new trial on the issue of damages, or if the new trial was awarded on any other ground, *e.g.*, an erroneous jury instruction or the admission of inadmissable evidence, there can be no interlocutory appeal to the supreme court.[138]

In the classic example of the statute's operation, the plaintiff will move for a new trial after the verdict has been returned on the ground of inadequacy of the verdict. If the trial court sustains the motion on that ground alone, section 11-7-213[139] will permit the defendant to appeal this order to the supreme court. The order from which appeal is taken is interlocutory and thus the sole issue that may be raised by the appellant, whether he was the defendant or plaintiff in the trial court, is whether the trial court abused its discretion by granting a new trial on the question of damages.[140] The appellee, however, whether defendant or plaintiff in the court below, is free to broaden the issues by way of a cross-appeal and by raising any issue that affected the amount of damages.[141] It should be noted, however, that if the appellant was the defendant below, he is deemed, by virtue of his appeal, to be requesting a reinstatement of the verdict and thereby admits to liability.[142]

No interlocutory appeal is allowed from an order denying a motion for a new trial on the ground of excessiveness or inadequacy of damages. In such a case, the entire suit proceeds directly to final judgment and is appealable as such.

VIII. Appeals from Orders Requiring Discovery or Imposing Sanctions for Failure to Make Discovery

Under section 13-1-327 of the Discovery Act,[143] the trial court may

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So. 2d 312, 314 (Miss. 1972) (no interlocutory appeal from circuit court); Morris v. Brown, 42 So. 2d 95, 95 (1949) (§ 11-51-7 does not apply to circuit court).

[137] Miss. Code Ann. § 11-7-213 (1972), *construed in* Dorris v. Carr, 330 So. 2d 872, 873 (Miss. 1976) (§ 11-7-213 is the only exception to rule that appeals from circuit must be from final judgment); City of Meridian v. Dickson, 266 So. 2d 143, 145 (Miss. 1972) (only available issue on interlocutory appeal is abuse of discretion by trial court in granting new trial as to damages); Byrd v. Sinclair Oil & Ref. Co., 240 So. 2d 623, 624-25 (Miss. 1970) (same).

[138] Byrd v. Sinclair Oil & Ref. Co., 240 So. 2d 623, 625 (Miss. 1970) (only inadequacy or excessiveness of damages can be the subject of appeal from order granting new trial).

[139] Miss. Code Ann. § 11-7-213 (1972).

[140] City of Meridian v. Dickson, 266 So. 2d 143, 144-45 (Miss. 1972).

[141] *Id.*

[142] *Id.*; *see* Dorris v. Carr, 330 So. 2d 872, 874 (Miss. 1976) (sole issue on appeal is the amount of damages).

[143] Act of April 7, 1975, 1975 Miss. Laws ch. 501, §§ 1-23 (codified at Miss. Code Ann. §§ 13-1-201 to 243 (Supp. 1976)).

compel a party to comply with discovery and may impose substantive and monetary sanctions for noncompliance:

> The orders available under section 12 include: one compelling discovery together with expenses, contempt of a deponent, taking certain facts as established, precluding a claim or defense, prohibiting certain evidence, striking the pleadings, staying the proceedings, dismissing the action, rendering default judgment, contempt in general, and expense and fee awards. Thus, the question arises: Which of these orders are appealable?[144]

Three of the orders listed above will be appealable as final judgments or decrees: (1) an order of dismissal, with or without prejudice, is considered a final judgment;[145] (2) a default judgment, technically an interlocutory order, may become a final judgment;[146] and (3) a contempt citation is appealable by statute.[147] The remaining orders entered under section 13-1-327 are strictly interlocutory, and no appeal will lie from any such orders entered in any court except the chancery court.[148]

Under existing statutory interpretation regarding appeals from the chancery court, there can be no appeal from an order which merely compels discovery, *e.g.*, an order requiring the production of documents or the giving of a deposition.[149] It is possible, however, that an interlocutory appeal might be allowed from a chancery court's order requiring the payment of expenses and attorney's fees or from an order which compels discovery if compliance would involve either great expense to the other party or considerable delay. In such a case, the order appealed is arguably one "whereby money is to be paid" or involves the avoidance of exceptional expense and delay, thereby invoking the language of the statute itself.[150] This question, however, is unsettled and must be left to future cases.

IX. PRESERVATION OF ERROR

All too often, the right to appeal a cause to the supreme court has meant little to the litigant who has failed to take the necessary steps in the lower court to preserve an alleged error for consideration on appeal. Therefore, it is incumbent upon counsel to "make his record" by raising an issue at the earliest opportunity through the proper motion or specific objection, obtaining a ruling on his motion or objection and thereafter taking other necessary procedural steps to ensure a review of the alleged error.

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[144] Pyle, Ott & Rumfelt, *supra* note 3, at 780.

[145] Mitchell v. Film Transit Co., 194 Miss. 550, 556, 13 So. 2d 154, 156 (1942) (with prejudice); Solomon v. Continental Baking Co., 174 Miss. 890, 897, 165 So. 607, 608 (1936) (without prejudice).

[146] Western Chain Co. v. Brownlee, 317 So. 2d 418, 418 (Miss. 1975) (writ of inquiry based on interlocutory default judgment will support a final judgment). *See also* MISS. CODE ANN. § 11-7-171 (1972) (final judgment entered upon execution of writ of inquiry after interlocutory judgment in damage actions).

[147] MISS. CODE ANN. § 11-51-11 (1972).

[148] See notes 117 through 127 and accompanying text *supra.*

[149] Equitable Assurance Soc'y v. Clark, 76 Miss. 22, 31, 28 So. 798, 798 (1898).

[150] MISS. CODE ANN. § 11-51-7 (1972).

A. *Transcript of the Record*

The supreme court will consider only those matters that are properly made a part of and which appear in the transcript of the record as it is filed with the supreme court.[151] The so-called "record"[152] includes all pleadings filed in the lower court, the actual transcript of proceedings and testimony as recorded by the court reporter, any exhibits introduced, tendered or marked for exhibit, the arguments of counsel, the jury's verdict, the judgment of the court,[153] and a bill of exceptions if one is taken. That material which is ultimately physically bound as the transcript of the record and deposited in the supreme court clerk's office is, of course, within the discretion of counsel. Each attorney must, however, remember to "designate" to the court reporter those portions of the proceedings which are to be included in the record for the appeal.[154] If the court reporter or the clerk of the trial court fails to include designated material within the transcript, or if the court reporter fails or refuses to transcribe the record, the supreme court will issue a writ of certiorari ordering the court reporter to transcribe the notes of the trial[155] or requiring the clerk of the trial court to perfect the record.[156] Again, the point to be emphasized is that in order to be designated for inclusion within the transcript of the record for review on appeal at all, counsel must first have "made his record."

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[151] Wortham v. State, 219 So. 2d 923, 926 (Miss. 1969) (failure to make charge in trial court precludes hearing on it on appeal); Seaney v. Seaney, 218 So. 2d 5, 7 (Miss. 1969) (questions not raised at trial will not be reviewed on appeal); Craig v. State, 208 Miss. 528, 530, 44 So. 2d 860, 861 (1950) (same); Alexander v. Hancock, 174 Miss. 482, 490, 164 So. 772, 773 (1935)(same).

[152] *See generally* MISS. CODE ANN. § 39-13-33 (Supp. 1976); MISS. SUP. CT. R. 1-5, app. I *infra*.

[153] If there was no jury trial in the lower court, counsel must request and receive the court's findings of fact. Seaney v. Seaney, 218 So. 2d 5, 7 (Miss. 1969). In any event, the judgment or decree appealed from must be written to be appealable since there can be no appeal from an oral pronouncement of judgment. Jackson v. Schwartz, 240 So. 2d 60, 62 (Miss. 1970).

[154] MISS. CODE ANN. § 9-13-33 (Supp. 1976).

[155] Brown v. City of Water Valley, 319 So. 2d 649, 649 (Miss. 1975) (certiorari to court reporter).

[156] MISS. SUP. CT. R. 4, app. I *infra*; *see* Mississippi State Highway Comm'n v. Gresham, 323 So. 2d 100, 104 (Miss. 1975) (certiorari to circuit clerk).

B. Pleadings

In order to preserve an issue or error for consideration on appeal, the issue or the objection must have been raised at the earliest opportunity. In many cases, this will require incorporating the issue into the pleadings filed in the court of original jursidiction.[157] Thus, defenses or matters in bar, *e.g.*, res judicata[158] or the statute of frauds,[159] must first be pleaded in the answer or they will not be considered on a subsequent appeal.

C. Contemporaneous and Specific Objections

Once in the trial court, a litigant must enter contemporaneous and specific objection to an alleged error, the court must rule on the objection and the objection and ruling must be recorded.[160] This rule applies to jury instructions given by the trial court as well as to all evidentiary matters.[161] Otherwise, and notwithstanding the appearance of the error in the record itself, the supreme court will treat the error as waived and will refuse to consider the matter as reversible error.[162] Only in the most extreme case, and usually when the error is "fundamental" or the record is replete with error, will the court take judicial notice of the matter as "plain error."[163] To date, the plain error doctrine has been applied sparingly.[164]

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[157] Lee v. Smith, 189 Miss. 636, 648, 198 So. 296, 299 (1940) (failure to state in bill of complaint allegation of clerk's refusal to allow redemption of property after tax sale precluded hearing issue on appeal).

[158] Forbes v. Columbia Pulp & Paper Co., Inc., 340 So. 2d 734, 736 (Miss. 1976).

[159] Brown v. Gravlee Lumber Co., 341 So. 2d 907, 912 (Miss. 1977).

[160] Cox v. State, 326 So. 2d 794, 795 (Miss.), *cert. denied*, 429 U.S. 849 (1976); Ratliff v. State, 313 So. 2d 386, 388 (Miss. 1975), *cert. denied,* 423 U.S. 1016 (1976); Thornton v. State, 313 So. 2d 16, 18 (Miss. 1975).

[161] Stubbs v. State, 311 So. 2d 339, 340, 342 (Miss. 1975) (jury instructions and evidentiary matters); Patterson v. State, 289 So. 2d 685, 686 (Miss. 1974) (jury instructions); Smith v. State, 288 So. 2d 720, 721 (Miss. 1974) (jury instructions); MISS. SUP. CT. R. 42, app. I *infra.*

[162] Cox v. State, 326 So. 2d 794, 795 (Miss.), *cert. denied*, 429 U.S. 849 (1976) (insufficient specificity in objection to allow consideration on appeal).

[163] MISS. SUP. CT. R. 11, app. I *infra.*

[164] McMullen v. State, 291 So. 2d 537, 539 (Miss. 1974) (supreme court can object to jury instructions to prevent manifest injustice); Wilson v. State, 248 So. 2d 802, 805 (Miss. 1971) (failure to object to dispersal of jury in the trial court will not bar reversal since a fundamental right is affected); Brooks v. State, 209 Miss. 150, 155, 46 So. 2d 94, 97 (1950) (failure of counsel to object at trial to violations of defendant's constitutional rights will not preclude the raising of such rights on appeal in a serious criminal case).

The most frequently cited reasons advanced for the contemporaneous objection rule are that a trial judge should not be held in error for matters which he has had no opportunity to consider and that a litigant should not be allowed to profit by encouraging or acquiescing in error.[165]

The contemporaneous objection rule requires that counsel not only object at his earliest opportunity,[166] but that he renew his objection to the subsequent introduction of the same or similar matter previously tendered into evidence. Failure to make the subsequent objection may be tantamount to waiver of the initial objection and, as a consequence, consideration of the error on appeal. However, since the supreme court has recognized the validity of a specific continuing objection approved by the trial court,[167] the objecting party is not at the mercy of a litigant who continues with a reference to objectionable matter.

Procedurally, the specific ground or grounds of an objection must be pointed out to the trial court or the objection will be treated as a general one which effectively waives the matter on appeal.[168] Thus, a litigant may not merely record a vague "objection" and expect the supreme court to pass on the matter as error unless the evidence was inadmissible for any purpose.[169] Furthermore, once the specific grounds of objection are stated, all other grounds of objection are waived and the party may not attempt to raise another or different ground of objection on appeal.[170]

In addition to making a contemporaneous and specific objection, a litigant must also pursue his objection or motion and secure a ruling by the trial court. Unless this is done, the supreme court will treat the objection or motion as waived.[171] This situation occurs most frequently with routine although often important pre-trial motions which are filed but not pursued.[172]

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[165] Stringer v. State, 279 So. 2d 156, 158 (Miss. 1973) (objection could have been made in lower court to prevent costly new trial); Cooper v. Lawson, 264 So. 2d 890, 891 (Miss. 1972) (a party cannot put the trial judge in error if matter was never presented to him for a ruling).

[166] *See* Mississippi State Highway Comm'n v. Cook, 270 So. 2d 695, 695 (Miss. 1972) (error not raised on appeal to circuit court is waived); Lott v. Watkins, 162 Miss. 507, 510, 137 So. 895, 896 (1931) (error not raised on appeal to circuit court from justice court).

[167] *See* Nash v. State, 253 Miss. 715, 719, 178 So. 2d 867, 868 (1965) (failure to object on specific grounds was permitted since the words used sufficiently pointed out the grounds of objection).

[168] Norman v. State, 302 So. 2d 254, 257 (Miss. 1974), *cert. denied,* 421 U.S. 966 (1976) (counsel must make a specific motion to suppress evidence).

[169] Nash v. State, 253 Miss. 715, 719-20, 178 So. 2d 867, 868 (1965) (general objection sufficed because the evidence was inadmissible for any purpose).

[170] Stringer v. State, 279 So. 2d 156, 158 (Miss. 1973).

[171] Smith v. State, 296 So. 2d 678, 680 (Miss. 1974) (failure to pursue the trial court's ruling on an objection will result in its waiver on appeal); Conn v. State, 260 So. 2d 471, 476 (Miss. 1972) (failure to obtain a ruling on a motion at the trial level results in its waiver on appeal).

D. *Offer of Proof and Bill of Exceptions*

The preservation of an issue for appeal requires adherence to particular courtroom tactics. If the trial court overrules an objection to certain evidence, counsel should ensure that the objectionable matter, his objection and the court's ruling appear in the record. If the trial court sustains an objection to the evidence tendered, counsel must, by proffer of testimony or by offer of proof, have the witness testify in the absence of the jury or dictate into the record the substance of the witness' testimony and exactly what he intended to prove through the introduction of the testimony or evidence.[173] Absent these steps, the matter will not appear in the record and the supreme court will not consider the alleged error on appeal.[174]

"Making the record," as it is called, is usually the least demanding requirement since the court reporter transcribes all of the proceedings which take place in the trial court.[175] However, if the objectionable matter, the objection itself, the offer of proof and the court's ruling are not recorded by the court reporter, the objecting party must secure a bill of exceptions signed by the trial judge in order to preserve the matter for consideration on appeal.[176] Indeed, an appeal may be predicated solely on a bill of exceptions.[177] A bill of exceptions is most frequently utilized to record objections to the closing argument of counsel which, apparently for pecuniary reasons, is rarely completely transcribed by the court reporter.[178]

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[172] Booker v. State, 326 So. 2d 791, 792 (Miss. 1976) (failure to pursue pre-trial motion).

[173] Brown v. State, 338 So. 2d 1008, 1009-10 (Miss. 1976) (error waived by defendant's failure to enter into record reasons evidence should have been admitted); Martin v. Wadlington, 337 So.2d 706, 708 (Miss. 1976) (error waived by defendant's failure to indicate in record what would have been shown by excluded testimony); Kinney v. State, 336 So. 2d 493, 495-96 (Miss. 1976) (error waived by defendant's failure to preserve in the record the materiality of the evidence offered).

[174] Brown v. State, 338 So. 2d 1008, 1009-10 (Miss. 1976); Martin v. Wadlington, 337 So. 2d 706, 708 (Miss. 1976).

[175] *See* MISS. CODE ANN. § 9-13-31 (1972) (requiring a court reporter in all criminal cases and most civil cases and excusing bills of exception for matters normally appearing in the record). In the absence of a court reporter, counsel may have the proceedings recorded on tape. *Id.* § 9-13-32 (Supp. 1976).

[176] Page v. State, 208 Miss. 347, 359-60, 44 So. 2d 459, 464 (1950) (error will not be considered unless in the record or presented by a bill of exceptions).

[177] Although it is available in any court, a bill of exceptions is not necessary if the testimony is taken by a court reporter. MISS. CODE ANN. § 9-13-31 (1972); *see id.* § 11-3-19 (on appeal to the supreme court); *id.* § 11-5-73 (chancery court); *id.* § 11-7-204 (circuit court); *id.* § 11-51-67 (general bill of exceptions in the absence of a transcript).

E. Motion for a New Trial

A properly drawn and timely filed motion for a new trial is probably the most essential step toward preserving error for consideration on appeal. Certain matters must be set forth as the grounds for the motion in order for the errors to be considered on appeal.[179] These are generally matters which developed after submission of the case to the jury and include: (1) all new matters, such as newly discovered evidence;[180] (2) an attack on the verdict as excessive or inadequate;[181] (3) a charge that jury's verdict is against the overwhelming weight of the evidence;[182] and (4) the denial of a continuance by the trial court.[183] Conversely, preservation of error for review on appeal does not require incorporating as grounds for the motion those errors which already appear of record and to which a contemporaneous and specific objection has been lodged.[184] Counsel is still required, however, to enter a specific and contemporaneous objection to an alleged error that occured during the trial. If no objection was entered during the trial, a litigant may not utilize the motion for a new trial to preserve the error for consideration on appeal.[185] The requirement concerning a motion for a new trial applies to the appellant and the cross-appellant alike.[186]

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[178] Clemons v. State, 320 So. 2d 368, 372 (Miss. 1975).

[179] Instances in which a motion for a new trial is necessary are set forth in Colson v. Sims, 220 So. 2d 345, 346-47 (Miss. 1969).

[180] The evidence must have the potential for producing a different result. Redmond v. Marshall, 162 Miss. 359, 363, 137 So. 733, 734 (1931).

[181] T.G. Blackwell Chevrolet Co. v. Eshee, 261 So. 2d 481, 485-86 (Miss. 1972) (court refused to consider claim of excessive damages because appellant failed to move for a new trial below on the ground that the verdict was excessive); Tendall v. Davis, 129 Miss. 30, 35-40, 91 So. 701, 701 (1922)(failure to allege inadequate damages in motion for a new trial below prevented appeal on that ground).

[182] Ponder v. State, 335 So. 2d 885, 886 (Miss. 1976); Neves v. State, 268 So. 2d 890, 893-94 (Miss. 1972). This particular assignment of error is not preserved, in either civil or criminal cases, by setting forth in the motion for new trial that "[t]he verdict of the jury evinces bias, prejudice and passion." Cooper v. Lawson, 264 So. 2d 890, 891 (Miss. 1972).

[183] King v. State, 251 Miss. 161, 172, 168 So. 2d 637, 641 (1964).

[184] Colson v. Sims, 220 So. 2d 345, 346 (Miss. 1969).

[185] Porter v. State, 343 So. 2d 1236, 1237 (Miss. 1977) (motion for new trial was insufficient to preserve error to which there was no reference in the record); Sandifer Oil Co. v. Dew, 220 Miss. 609, 628, 71 So. 2d 753, 757 (1954) (supreme court review of jury instructions was improper when appellant raised objection for the first time in his motion for a new trial).

[186] Flynn v. Kurn, 183 Miss. 413, 423, 184 So. 160, 162-63 (1938) (cross-appellant may not challenge jury verdict on appeal if he failed to do so by motion for a new trial).

As a general rule, a motion for a new trial must be filed prior to the adjournment of the term of court at which the judgment was entered.[187] Since a regular term of court ends after the judge signs the minutes on the last day of the term,[188] counsel will ordinarily have sufficient time in which to file his motion. However, when the court has been convened in vacation or was specially convened for the trial of only one cause, *e.g.*, most eminent domain cases, adjournment occurs automatically upon entry of the final judgment.[189] The court in such a case is unable to consider a motion for a new trial filed after the entry of a final judgment.[190] Accordingly, counsel must either file the motion for a new trial before the final judgment is entered or secure an order from the court prior to the final judgment granting additional time to file the motion after the term of court has ended.[191]

The failure to take these steps in a vacation court or special court of eminent domain has a two-fold effect. First, the trial court will have no jurisdiction to consider the motion for a new trial. As a result, the error sought to be raised on appeal is not preserved. Second, the 45-day period governing the taking of an appeal is not tolled and continues to run, thus potentially leaving the unknowing appellant without an appeal.[192]

F. Additur and Remittitur

The motion for a new trial in a civil cause traditionally seeks a new trial on the ground that the verdict was inadequate as to the plaintiff or excessive as to the defendant. The trial court may overrule the motion upon the condition that the defendant agree to an additur or that the plaintiff agree to a remittitur.[193] The party charged with the condition has three options: (1) he may refuse to accept the additur or remittitur and retry the case as to damages only; (2) he may refuse to accept the additur or remittitur and, once a new trial is ordered, take an interlocutory appeal from the order granting the new trial;[194] or (3) he may accept the additur or remittitur and allow a final judgment to be rendered.[195] In the past, a party who elected the third option was deemed to be estopped by his consent to the additur or remittitur from assigning its entry as error on appeal.[196] Under a recent amendment to the statute governing the entry of additur and remittitur,[197] however, a party may now consent to an entry of additur or remittitur in the trial court without waiving the entry as an assignment of error in his subsequent cross-appeal.[198] The amendment eliminates the estoppel element and permits a cross-appeal by the consenting party with the entry assigned as error.[199]

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[187] Evers v. Truly, 317 So. 2d 414, 417 (Miss. 1975); *see* note 99 and accompanying text *supra*.

[188] MISS. CODE ANN. § 9-1-33 (1972).

[189] Mississippi State Highway Comm'n v. Gresham, 323 So. 2d 100, 101 (Miss. 1975) (eminent domain proceeding adjourned on same day as judgment); Mississippi State Highway Comm'n v. First Methodist Church, 323 So. 2d 92, 94-95 (Miss. 1975) (same); Mississippi State Highway Comm'n v. Taylor, 293 So. 2d 9, 12 (Miss. 1974) (same).

[190] Mississippi State Highway Comm'n v. First Methodist Church, 323 So. 2d 92, 94-95 (Miss. 1975).

[191] *Id.*

[192] The problem is a recurring nightmare in eminent domain cases. See note 189 *supra*.

[193] MISS. CODE ANN. § 11-1-55 (Supp. 1976).

[194] See section VII. *B. supra*.

X. Waiver of the Right to Appeal

It should be noted that in the category of cases discussed in the preceding section, the right to appeal does in fact exist, but is often denuded of any substantive meaning by the appellant's failure to preserve or through his waiver of specific errors. In contrast, there are instances in which the very right to appeal is waived. These cases traditionally prohibit an appeal by any party who has recognized the validity of a demand made against him or who has acknowledged the satisfaction of a judgment rendered in his favor. Thus, any party may waive his right to appeal by concluding a binding contract not to appeal.[200] Additionally, a party may not appeal from a judgment entered by consent or confession in a civil cause in the circuit or chancery court.[201] Similarly, a criminal defendant may not appeal from a judgment of conviction entered in the circuit or the county court if he pleaded guilty to the offense.[202] Further, a party also waives his right to appeal if he has recovered only a portion of the judgment sought, but has accepted that portion actually recovered.[203] Nevertheless, a defendant may pay any or all of a judgment rendered against him without waiving his right to appeal, and coercion by execution on the judgment need not be proved to avoid waiver.[204]

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[195] *See* Thomas v. Fleming, 241 Miss. 26, 32-33, 128 So.2d 854, 855 (1961) (discussion of options).

[196] Union Oil Co. v. Bishop, 236 So. 2d 434, 435-36 (Miss. 1970); Five-Two Taxi Serv., Inc. v. Simmons, 241 Miss. 182, 188, 129 So. 2d 401, 403 (1961); Thomas v. Fleming, 241 Miss. 26, 32-33, 128 So. 2d 854, 855 (1961).

[197] Miss. Code Ann. § 11-1-55 (Supp. 1976).

[198] The amendment apparently overrules, at least in part, Union Oil Co. v. Bishop, 236 So. 2d 434, 435-36 (Miss. 1970) (cross-appeal disallowed as to appellee who had unconditionally accepted remittitur below and subsequently cross appealed charging that such remittitur was error), and Thomas v. Fleming, 241 Miss. 26, 32-33, 128 So. 2d 854, 855 (1961) (appellee's acceptance of remittitur even though under protest bound him to such acceptance and there could be no appeal charging the remittitur as error).

[199] Miss. Code Ann. § 11-1-55 (Supp. 1976).

[200] *See* Barnes v. Moody, 6 Miss. (5 Howard) 636, 637(1841) (agreement not to appeal error in return for temporary forbearance from enforcing judgment).

[201] Miss. Code Ann. § 11-51-3 (1972).

[202] *Id.* § 99-35-101. The criminal defendant may ultimately obtain an appeal by pursuing a writ of error *coram nobis*. *Id.* § 99-35-145; Miss. Sup. Ct. R. 38, app. I *infra*. *See also* note 94 *supra*.

XI. Dismissal and Reinstatement of the Appeal

If the appellee or the cross-appellant seeks dismissal of the appeal on the basis of a jurisdictional defect which appears of record, the issue should be raised in the supreme court by a motion to dismiss. If the cause has yet to be placed on the supreme court's docket, the proper course is a motion to docket and dismiss.[205] Thus, when one party erroneously takes an appeal from an interlocutory order or decree, or the chancellor erroneously grants an interlocutory appeal, or the lower court was without jurisdiction to render an order or decree, or the appeal was not perfected within the statutory period, the remedy is a motion to dismiss[206] or to docket and dismiss.[207]

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[203] Madison County v. City of Canton, 171 Miss. 547, 553, 158 So. 149, 150 (1934) (city's acceptance of partial recovery precluded appeal on any other part of the order); Adams v. Carter, 92 Miss. 579, 595, 47 So. 409, 411 (1908) (acceptance of payment of part adjudged due precluded appeal from judgment against other claims since case arose at law and not in equity). This prohibition stems from the fact that there is no general statute which permits an appeal from part of a civil judgment. Generally, because the judgment encompasses the entire cause, the appeal must be from the judgment as a whole. Any acceptance of part of the judgment is thus deemed to be an acceptance of the whole judgment. Adams v. Carter, 92 Miss. 579, 595-96, 47 So. 409, 411-12 (1908). *But see* Miss. Code Ann. § 11-3-9 (1972) (implies that an appeal may lie from a part of a judgment which awards property and damages). *See also* Miss. Sup. Ct. R. 12, app. I *infra* (authorizes a new trial only as to some issues of a cause "if separable").

[204] Currie v. Bennett, 111 Miss. 228, 230, 71 So. 324, 324 (1916).

[205] *See* Insured Sav. & Loan Ass'n v. State, 242 Miss. 547, 556-57, 135 So. 2d 703, 707 (1961) (plea in bar rather than a plea to docket and dismiss required to plead matters not appearing of record which arose after judgment).

[206] Williams v. Michael, 319 So. 2d 226, 227 (Miss. 1975) (appeal not properly before the circuit court rendered all proceedings in that court without legal effect and not appealable to the supreme court); Evers v. Truly, 317 So. 2d 414, 417 (Miss. 1975) (motion to dismiss was proper since the circuit court was without jurisdiction to invalidate order overruling motion for a new trial; limitation period not tolled by the second order).

[207] Mississippi State Highway Comm'n v. Gresham, 323 So. 2d 100, 103 (Miss. 1975) (motion to docket and dismiss granted since motion for a new trial, filed after the appeal, did not toll limitation statute); Mississippi State Highway Comm'n v. First Methodist Church, 323 So. 2d 92, 95 (Miss. 1975) (since special court of eminent domain had no jurisdiction after judgment to entertain motion for a new trial, motion to docket and dismiss the appeal from the denial was proper); Fisher v. Crown, 289 So. 2d 921, 924 (Miss. 1974) (motion to docket and dismiss sustained where averments conflicted as to timely filing of appeal bond).

However, if dismissal is sought on grounds regarding matters which do not appear of record, the moving party should file a plea in bar of the appeal in the supreme court.[208] The plea must be filed before submission of the case for decision[209] and should be accompanied by affidavits setting forth the supporting facts.[210] A plea in bar of an appeal is also proper when the appealing party has waived his right to appeal, *e.g.*, by acknowledging satisfaction of a judgment,[211] or when the cause has become moot.[212] In any case, however, if the appeal is dismissed, the appealing party may file a petition for rehearing and request reinstatement of the appeal.[213]

XII. TIME FOR APPEAL

An appeal from a final judgment or decree, whether the cause be criminal or civil, must be taken within forty-five days after its rendition.[214] The date of rendition for appeal purposes is the date, in term time or in vacation, when the judgment or decree was signed by the judge or chancellor and filed with the clerk of the court for entry in the minutes of the court. If the judgment was not signed by the judge or the chancellor, the rendition date will be taken as the date which appears in the minutes.[215] Notwithstanding the date of rendition, however, the forty-five day limitation period does not begin to run as to any party until there is a final judgment as to all of the parties to the cause.[216] In addition, the filing of a timely post-judgment motion challenging the judgment will toll the limitation period until final disposition of the motion.[217] An appeal from an interlocutory order or decree entered in the chancery court must, however, be taken within thirty days after the order or decree is filed with the clerk of the court.[218]

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[208] Insured Sav. & Loan Ass'n v. State, 242 Miss. 547, 556-57, 135 So. 2d 703, 707 (1961); McCaskey Register Co. v. Swor, 154 Miss. 396, 400, 122 So. 753, 753 (1929).

[209] McCaskey Register Co. v. Swor, 154 Miss. 396, 400, 122 So. 753, 753 (1929).

[210] Insured Sav. & Loan Ass'n v. State, 242 Miss. 547, 557, 135 So. 2d 703, 707-08 (1961).

[211] Adams v. Carter, 92 Miss. 578, 592, 46 So. 59, 59-60 (1908).

[212] Insured Sav. & Loan Ass'n v. State, 242 Miss. 547, 556-58, 135 So. 2d 703, 707-08 (1961) (plea in bar proper to set forth matters occurring after judgment appealed from and not appearing of record). The court did, however, recognize that it had previously dismissed appeals for mootness upon a motion to docket and dismiss. *Id.* at 557, 135 So. 2d at 707, *citing* State *ex rel.* Knox v. Board of Supervisors, 115 So. 343 (Miss. 1928); State *ex rel.* Collins v. Standard Constr. Co., 118 Miss. 469, 78 So. 625 (1918) (en banc).

[213] MISS. SUP. CT. R. 18, app. I *infra*; Mississippi State Highway Comm'n v. Gresham, 323 So. 2d 100, 104 (Miss. 1975) (rehearing established that despite appellant's failure to assert timely notice, notice of appeal was in fact timely); Jackson v. Schwartz, 240 So. 2d 60, 61 (Miss. 1970) (rehearing permitted in spite of appellant's motion to dismiss); *see* section XXI. *infra.*

[214] MISS. CODE ANN. § 11-51-5 (Supp. 1976) (includes a special savings clause for litigants under a disability of minority or an unsound mind).

[215] Jackson v. Schwartz, 240 So. 2d 60, 61 (Miss. 1970).

[216] American Empire Life Ins. Co. v. Skil-Craft Builders, Inc., 291 So. 2d 735, 735-36 (Miss. 1974) (trial court sustained a demurrer to defendant's cross-bill against only one of several parties; defendant was therefore unable to appeal the decree sustaining the demurrer until it was final as to all other parties).

Computation of the limitation period is set out in section 1-3-67 of the Code.[219] Ordinarily, the date on which the judgment was rendered should be excluded and the last day included. When the last day falls on a Sunday, however, the date of judgment should be included so that the 45-day period expires on the Saturday preceding that Sunday. If by excluding the date of judgment, the last day falls on a Saturday, the 45-day period will not end until the following Monday. Finally, if the last day should fall on a legal holiday, the holiday should be excluded and the following day counted as the last day.[220]

XIII. STATUTORY METHODS OF APPEAL

The term "methods of appeal" refers to those procedural steps that must be taken in order to stop the running of the 45-day limitation period and to divest the lower court of jurisdiction by removing jurisdiction to the supreme court. Once these steps are taken, the appeal is "perfected."

A. Civil Causes

The four statutory methods of perfecting an appeal in Mississippi are: (1) by order of the judge or chancellor granting the appeal, provided an appeal bond is posted if bond is required;[221] (2) upon a written petition for appeal addressed to the clerk of the trial court, provided an appeal bond is posted if required;[222] (3) upon posting an appeal bond only, if required;[223] or (4) upon filing a transcript of the record in the supreme court, provided an appeal bond is posted if required.[224]

1. Order of the Lower Court

The first available method of appeal is by procuring an order of the lower court granting the appeal.[225] This method is generally used only for interlocutory appeals from the chancery court, in which case an order must be entered,[226] and appeals from a circuit court order granting a new trial solely on the ground of the excessiveness or the inadequacy of the verdict.[227] In any event, this method of appeal does not obviate the requirements of posting an appeal bond if bond is required,[228] or, if no bond is required, filing a petition for appeal or a transcript of the record.[229] Thus, except in the two instances discussed, court-ordered appeal is the least utilized and the least desirable method of appeal.

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[217] See note 98 *supra*.

[218] MISS. CODE ANN. § 11-51-7 (1972); Farrar v. Phares, 232 Miss. 391, 394, 99 So. 2d 594, 595 (1958) (30 days from date of filing of the decree).

[219] MISS. CODE ANN. § 1-3-67 (1972).

[220] Parkman v. Mississippi State Highway Comm'n, 250 So. 2d 637, 639 (Miss. 1971).

[221] MISS. CODE ANN. §§ 11-51-7, -13, -27 (1972).

[222] *Id.* §§ 11-51-13, -15.

[223] *Id.* §§ 11-51-15, -25, -53.

[224] *Id.* § 11-51-25.

2. Petition for Appeal

A second method for perfecting an appeal is by filing a written petition for appeal with the clerk of the trial court. The petition should state a rendition of the judgment or decree and request an appeal.[230] The clerk must mark the petition "filed" and sign his or her name across the mark. The appeal is considered taken when the petition is presented and any required appeal bond has been given.[231]

3. Appeal Bond

In most cases, the appellant will discover that the simplest and only step necessary to perfect an appeal is to tender or post an appeal bond with the clerk of the trial court to cover the costs of the transcript and the appeal. Since all appellants except those expressly exempted by statute must post an appeal bond,[232] and since any appellant who must post an appeal bond may perfect his appeal by that act alone, there is no need in such a case for the appellant to file a petition for appeal or a transcript of the record in the supreme court.[233] When an appeal bond is required, however, the appeal cannot be perfected until the bond is given.[234]

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[225] *Id.* §§ 11-51-7, -13, -27.

[226] *Id.* § 11-51-7.

[227] *Id.* § 11-7-213.

[228] *Id.* § 11-51-27.

[229] *See id.* §§ 11-51-13, -25; Leigh v. Deas, 267 So. 2d 318, 318 (1972) (appeal dismissed for failure to post appeal bond); Griffith v. Bourn, 109 Miss. 360, 361-62, 69 So. 177, 177 (1915) (same).

[230] Miss. Code Ann. §§ 11-51-13, -15 (1972).

[231] *Id.* § 11-51-15.

[232] *Id.* § 11-51-53 (unless otherwise provided, an appeal is not considered perfected unless bond is given and approved).

[233] *Id.* §§ 11-51-15, -25; *see* Mississippi State Highway Comm'n v. Brown, 250 Miss. 773, 777, 162 So. 2d 508, 509 (1964) (written petition for appeal is not required; in cases where bond is not required, the appeal is considered taken at the time of the filing); Oswalt v. Austin, 192 Miss. 653, 655-56, 6 So. 2d 924, 924 (1942) (a written petition is not necessary; where no appeal bond is required, the appeal is considered taken as of the date the transcript is filed).

a. Appeal Bond for Multiple Parties

Any one or more of the parties to a judgment or decree may appeal without the consent of any other party.[235] If more than one party perfects the appeal, all joining parties may be jointly named as principals on the bond.[236] Only one of these parties, however, need actually sign the bond.[237]

As to those parties who do not join in the appeal, the clerk of the supreme court will summon them to join.[238] Although a party so summoned cannot be required to join in the appeal,[239] each party who does join must also give a proper appeal bond for costs within forty-five days from the date the appeal was first perfected.[240]

b. Appeal Bond for Cross-Appellants

The general rule is that an appellee to a direct appeal need not post an appeal for costs in order to perfect a cross-appeal. The rule was succinctly set forth in *Duckworth v. Allis-Chalmers Manufacturing Co.*:[241]

> An appellee, against whom a direct appeal with bond is taken, may file a cross-appeal without the execution of an appeal bond, by filing a cross-assignment of errors, if the record is sufficient for consideration of the cross-appeal. The cross-appeal must be by one who occupies the status of an appellee in the main appeal, against parties who are before

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[234] Miss. Code Ann. § 11-51-53 (1972). *See* Gulf, M. & O.R.R. v. Forbes, 228 Miss. 134, 139, 87 So. 2d 488, 489 (1956); Miller v. Phipps, 152 Miss. 437, 441, 119 So. 170, 171 (1928).

[235] Miss. Code Ann. § 11-51-17 (1972); Wilkinson v. Love, 149 Miss. 523, 535, 115 So. 707, 710 (1928).

[236] Miss. Code Ann. § 11-51-47 (1972) ("Appeal bonds shall be sufficient if signed by one or more of several appellants, with sureties . . . .").

[237] Miss. Code Ann. § 11-51-47 (1972); Avent v. Markette, 109 Miss. 835, 839, 69 So. 705, 706 (1915).

[238] Miss. Code Ann. § 11-51-17 (1972); *see* United States Fidelity & Guar. Co. v. Rice, 184 Miss. 443, 450-51, 186 So. 620, 620 (1939) (since party failed to join appeal after being served with summons, judgment remained in effect as to him even though reversed as to those parties who did appeal).

[239] Miss. Code Ann. § 11-51-17 (1972).

[240] *Id.* §§ 11-51-17, -21; *cf.* Duckworth v. Allis-Chalmers Mfg. Co., 247 Miss. 198, 208-09, 150 So. 2d 163, 166 (1963) (although appellee may cross-appeal without bond, when an appeal is taken against one party without joining the other, the latter must file bond to secure review).

[241] 247 Miss. 198, 210, 150 So. 2d 163, 168 (1963).

> the Court on the main appeal. That is determined by ascertaining the obligees in the direct appellant's bond. Where a cross-appeal is sought to be taken against parties who are not before the Court on the main or direct appeal, it is necessary that the cross-appellant file within the statutory period [of forty-five days] an appeal bond, which would include the parties who are not before the Court on the direct appeal.

c. *Exemption From Appeal Bond*

Those appellants in civil causes who are expressly exempted by statute from posting an appeal bond for costs, *e.g.*, the State Highway Department or a municipality,[242] must still file either a petition for appeal with the clerk of the trial court or the transcript of the record with the supreme court.[243] It is possible that the notice to the court reporter can be drafted such that a copy sent to the clerk of the trial court will serve as a petition for appeal, thereby perfecting the appeal.[244]

4. Transcript

An appeal may also be taken by filing a copy of the transcript of the record with the clerk of the supreme court within the 45-day period allowed for appeals.[245] Additionally, as with a court order granting an appeal or a petition for appeal, the appellant must also post an appeal bond for costs with the clerk of the trial court if the bond is required.[246]

B. *Criminal Causes*

Section 99-35-105[247] governs the appeal bond for costs that must be posted by a criminal defendant. The statute exempts an indigent criminal defendant from posting bond if he files an affidavit with the clerk of the trial court to the effect that he is unable to give an appeal bond or unable to deposit a sufficient sum of money to cover costs.[248] However, if the indigent criminal defendant gives his "pauper's affidavit" in lieu of the appeal bond for costs, he must also file either a petition for appeal with the clerk of the trial court or a transcript of the record with the supreme court to perfect his appeal.[249] As in a civil cause, it is possible to so word the pauper's affidavit that it suffices as a petition for appeal.[250]

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[242] MISS. CODE ANN. § 11-51-191 (Supp. 1976).

[243] *Id.* §§ 11-51-13, -15, -25. Otherwise, the appeal will be dismissed. Mississippi State Highway Comm'n v. Gresham, 323 So. 2d 100, 103-04 (Miss. 1975).

[244] Mississippi State Highway Comm'n v. Gresham, 323 So. 2d 100, 103-04 (Miss. 1975).

[245] MISS. CODE ANN. § 11-51-25 (1972).

[246] *See* Mississippi State Highway Comm'n v. Brown, 250 Miss. 773, 776, 162 So. 2d 508, 509 (1964) (commission appeal made without requirement); Oswalt v. Austin, 192 Miss. 653, 655, 6 So. 2d 924, 924 (1942) (no appeal bond required of executor or administrator of an estate).

[247] MISS. CODE ANN. § 99-35-105 (1972) (appeal bond is in amount double the estimated amount of costs accrued and likely to accrue and is conditioned to pay all costs should the judgment be affirmed).

[248] *Id.*; *see* Tarrants v. State, 219 So. 2d 170, 171 (Miss. 1969) (affidavit in lieu of bond); Husbands v. State, 105 Miss. 513, 516, 62 So. 278, 278 (1913) (same).

XIV. APPEALS WITH AND WITHOUT SUPERSEDEAS

A. Appeal Bond Without Supersedeas

Standing alone, the appeal bond is designed only to insure the payment of the costs of the transcript and the appeal.[251] Thus, if an appellant gives his appeal bond without supersedeas, there will be no stay of the proceedings in the trial court pending an interlocutory appeal, and no stay of execution on the judgment if the appeal is from a final judgment or decree.[252]

1. Civil Causes

If the cost of the transcript has not been prepaid, the party who wishes to appeal without supersedeas in a civil cause must post a bond to insure payment of all costs of the appeal in the event that the judgment against him is affirmed.[253] The bond is required to be in the penal sum of $500 and must be guaranteed by either two or more resident sureties or one bonding company licensed to do business in Mississippi.[254] The bond must name all appellees as obligees,[255] and both the appellant, as principal, and his sureties must sign the bond.[256] The appellant may not, however, sign as a surety for himself on the bond.[257]

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[249] Bennett v. State, 293 So. 2d 1, 3 (Miss. 1974) (appeal dismissed for failure to file petition or affidavit in manner and within time prescribed by statute), *overruled on petition for habeas corpus*, 523 F.2d 802, 803-04 (5th Cir. 1975) (crude, handwritten affidavit sufficed as petition for appeal).

[250] Bennett v. State, 523 F.2d 802, 803-04 (5th Cir. 1975), *overruling on petition for habeas corpus* 293 So. 2d 1 (Miss. 1974).

[251] MISS. CODE ANN. § 11-51-29 (1972); *id.* § 11-51-113 (Supp. 1976).

[252] *See* Orgill Bros. & Co. v. Roddy, 227 Miss. 291, 298-99, 86 So. 2d 37, 39-40 (1956) (since materialman appealed trial court's dismissal of its petition for intervention without supersedeas, interim distribution of garnishment proceeds to others permitted); Stone v. McKay Plumbing Co., 200 Miss. 792, 818, 30 So. 2d 91, 94 (1947) ("if the appeal is without supersedeas, the successful litigant may proceed immediately to execute on the judgment").

[253] MISS. CODE ANN. § 11-51-29 (1972).

[254] *Id.*

[255] Williams v. J.E. Walton & Son, 202 Miss. 641, 645, 32 So. 2d 131, 132 (1947).

[256] MISS. CODE ANN. §§ 11-51-29, -47 (1972).

[257] Lipson v. Lipson, 183 So. 2d 900, 905 (Miss. 1966) (appellants could not become sureties for each other by executing two appeal bonds instead of one); Williams v. J.E.

Upon motion by the clerk of the trial court or by any party that the cost of the appeal will exceed $500, the trial court may order a bond for costs in a larger amount.[258] If the cost of the transcript has been prepaid, the appellant need only post a bond in the penal sum of $100 or deposit $100 in cash with the clerk of the trial court in lieu of posting the appeal bond.[259]

2. Criminal Causes

There is no authority allowing a criminal defendant to perfect an appeal without supersedeas. Thus, it is interesting to note that the statute which governs criminal defendants' appeal bonds for costs appears at first blush to require an appeal bond or pauper's affidavit only in cases where the defendant wishes to stay the execution of the judgment or the sentence appealed from.[260] The cases, however, have consistently held that an appeal bond or a pauper's affidavit must be given in order to appeal the judgment itself.[261] Consequently, the criminal defendant can stay the execution of the judgment merely by perfecting the appeal and his appeal is one "with supersedeas".

B. Appeal Bond With Supersedeas

1. Civil Causes

As a general rule, the appellant in any appeal from a civil cause may stay execution of the judgment rendered against him by posting an appeal bond with supersedeas.[262] The amount of the supersedeas bond is designed to insure preservation of the judgment as well as payment of the costs of the appeal.[263]

Appellants have been granted the right to appeal with supersedeas

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Walton & Son, 202 Miss. 641, 646, 32 So. 2d 131, 132 (1947) (neither corporation nor individual against whom judgment was rendered could act as surety).

[258] Miss. Code Ann. § 11-51-29 (1972).

[259] *Id.* §§ 11-51-29, -113 (Supp. 1976).

[260] *Id.* § 99-35-105 (1972).

[261] Tarrants v. State, 219 So. 2d 170, 171 (Miss. 1969) (certiorari by supreme court on pauper's affidavit in lieu of bond required by circuit court); Wallace v. State, 149 Miss. 198, 200, 115 So. 342, 342 (1928) (mistake in form required of appeal bond did not invalidate appeal as correction allowed six months after appeal); Husbands v. State, 105 Miss. 513, 516, 62 So. 278, 278 (1913) (appeal will lie when statute has been satisfied by either appeal bond or pauper's oath).

[262] Miss. Code Ann. §§ 11-51-31 to -43 (1972); *see* Yazoo & M.V.R.R. v. Adams, 78 Miss. 977, 985, 30 So. 44, 45 (1901) (the only office of a supersedeas is to stay execution of a court order) (dictum).

[263] *See, e.g.,* Miss. Code Ann. § 11-51-31 (1972) (bond based on value of matter in controversy).

in only three classes of cases: "(1) Where there is a money decree or judgment; (2) where there is a decree or judgment for the recovery of or against the retention of specific property; or (3) where the decree directs the sale or delivery of possession of real estate."[264] In all other causes, the decision as to whether the appeal will be allowed with supersedeas is within the discretion of the trial court judge or a justice of the supreme court.[265]

The generally applicable supersedeas statute requires the appellant to post or tender a bond to satisfy the judgment or decree appealed from, the judgment that may be rendered in the supreme court and the costs of the appeal if the judgment below is affirmed.[266] The bond must be in the penal sum of 125% of the amount of the judgment or decree appealed from or 125% of the value of the property or matter in controversy.[267] Additionally, the bond must have the same sureties and designate the same obligees as required for an ordinary appeal bond for costs.[268]

In addition to those statutes which provide for supersedeas in specific cases,[269] section 11-51-43 allows supersedeas in the discretion of the trial court judge or a supreme court justice.[270] In those cases in which no statute specifically provides for supersedeas, the appellant should first post his appeal bond for costs within the forty-five day period, thereby perfecting his right to appeal, and then file a motion for supersedeas in the supreme court.[271] After the bond is given, the clerk of the trial court will issue the writ of supersedeas and serve it on the sheriff who is charged with the duty of ensuring the stay of execution.[272]

As in the case of multiple parties-appellant, where each party must post an appeal bond to perfect the appeal as to himself, each party-appellant who desires to supersede or stay the execution of the judgment in the lower court must also obtain an appeal bond with supersedeas.[273]

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[264] Walton v. City of Tupelo, 241 Miss. 894, 905, 125 So. 2d 922, 922 (1961) (supersedeas in civil cases is a matter of right only under ANN. MISS. CODE 1163, -65, -67 (1942), current versions at MISS. CODE ANN. §§ 11-51-31, -35, -39 (1972)); Sartin v. Barlow, 196 Miss. 159, 167-68, 16 So. 2d 372, 375-76 (1944) (same).

[265] Walton v. City of Tupelo, 241 Miss. 894, 905, 125 So. 2d 922, 922 (1961); *see* MISS. CODE ANN. §§ 9-1-19, 9-3-33, 11-51-43 (1972).

[266] MISS. CODE ANN. § 11-51-31 (1972).

[267] *Id.*

[268] See section XIV. *A.* 1. *supra.*

[269] MISS. CODE ANN. §§ 11-51-35 to -41 (1972).

[270] *Id.* § 11-51-43.

[271] *Id.*; *see* Summer v. Henn, 323 So. 2d 751, 754-55 (Miss. 1975) (motion to docket and dismiss sustained because bond not timely filed).

[272] MISS. CODE ANN. § 11-51-59 (1972); *see* Memphis Grocery Co. v. Anderson, 76 Miss. 322, 324-26, 24 So. 387, 388 (1898) (sheriff not liable to successful appellant for property turned over to judgment holder absent service of supersedeas).

[273] MISS. CODE ANN. § 11-51-23 (1972).

Presumably, several parties may be jointly named as principals on the supersedeas bond and only one such appellant need actually sign the bond.[274] However, the decree remains in effect as to those appellants who do not secure or join in supersedeas of the judgment and the appellee may seek a writ of execution which will be enforced against such a party.[275]

2. Criminal Causes

Technically there cannot be a "supersedeas" of the judgment against a criminal defendant. The criminal defendant can, however, stay execution of the judgment appealed from by giving a bond conditioned to pay all costs in the event the judgment is affirmed.[276] The bond must have the usual sureties and be in a penal sum twice the estimated amount of the costs accrued and likely to accrue.[277] If the criminal defendant is indigent, he may stay the judgment by making affidavit to the clerk of the trial court that he is unable to give a bond or to make a sufficient cash deposit to cover the costs.[278]

XV. NOTICE TO THE COURT REPORTER

As formerly written, section 9-13-33 classified notice to the court reporter to transcribe the notes of the trial as a jurisdictional requirement.[279] Indeed, the supreme court construed the statute as requiring that notice be given well before the expiration of the period for perfecting the appeal itself.[280] The statute has, however, been amended to alleviate application of these onerous requirements and now requires that any party who takes an appeal must give the court reporter notice that a copy of the notes is desired not later than ten days *after* perfecting his appeal.[281] The notice must designate those portions of the record, the proceedings and the evidence that are to be included in the transcript of the record. A copy of the notice containing a certificate of service must also be filed with the clerk of the trial court and served on opposing counsel.[282]

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[274] See notes 235 through 237 and accompanying text *supra.*

[275] MISS. CODE ANN. § 11-51-23 (1972); *see* United States Fidelity & Guar. Co. v. Rice, 184 Miss. 443, 449-51, 186 So. 620, 621 (1939) (judgment against sheriff and his surety reversed as to surety but remained in effect against sheriff when only surety took appeal and posted bond).

[276] MISS. CODE ANN. § 99-35-105 (1972).

[277] *Id.*

[278] *Id.* The appeal bond for costs which perfects the appeal and stays execution of the judgment and sentence should not be confused with the appearance or bail bond required of a criminal defendant who desires his freedom pending appeal. *See id.* §§ 99-35-109 to -119 (bail procedures after conviction); Husbands v. State, 105 Miss. 513, 516, 62 So. 278, 278 (1913) (pauper's oath is sufficient to perfect appeal, but bail bond is required for release from custody).

[279] MISS. CODE ANN. § 9-13-33 (1972).

[280] McGee v. State, 203 Miss. 609, 611, 35 So. 2d 628, 628 (1948) (court is powerless to order transcript of record because giving notice is jurisdictional), *overruled,* Haralson v. State, 308 So. 2d 222, 224 (1975) (prior holdings that notice was jurisdictional were the result of misconstruction).

Consequently, the court now considers the notice statute to be merely procedural rather than jurisdictional[283] and the rules of court provide that an appellee or cross-appellee waives such a defect unless he files a motion to strike the court reporter's notes for failure to comply with the statute not later than ten days after the transcribed notes are filed in the supreme court.[284]

XVI. REMOVAL OF JURISDICTION TO THE SUPREME COURT

Although different courts of original jurisdiction may have concurrent jurisdiction over a cause, jurisdiction between a court of original jurisdiction and a court of appeals is either wholly in the former or wholly in the latter; two courts cannot share or split jurisdiction over the same cause. Under the Mississippi statutes, jurisdiction over a cause is removed or transferred to the supreme court upon perfection of the appeal, whether by posting the appeal bond or filing a petition or transcript.[285] Once jurisdiction is removed to the supreme court, the lower court is divested of all jurisdiction over the cause and can neither rule on any motions filed subsequent to perfecting the appeal[286] nor enter a binding opinion, order or decree.[287]

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[281] MISS. CODE ANN. § 9-13-33 (Supp. 1976).

[282] *Id.* The court has allowed substantial compliance with the statute to suffice. Mississippi State Highway Comm'n v. Gresham, 323 So. 2d 100, 104 (Miss. 1975) (notice was not accompanied by a certificate nor was it served on opposing counsel).

[283] Haralson v. State, 308 So. 2d 222, 223 (Miss. 1975).

[284] MISS. SUP. CT. R. 16, app. I *infra.* In a recent case, the court simply refused to apply Rule 16(d) even though no notice was given to the reporter and the motion to strike was timely filed. Fairley v. State, 343 So. 2d 483, 483 (Miss. 1977). The court's jurisdiction for refusing to strike the notes was that the murder conviction appealed from was sufficiently weighty a subject to warrant review. Additionally, since the transcript and notes were on file at the time of the hearing, Rule 16(d) was deemed not to apply. *Id.* Justice Sugg dissented from the majority opinion on the grounds that the court should have amended Rule 16(d) rather than ignoring its existence. *Id.* at 343-44 (Sugg, J., dissenting).

[285] See notes 221 through 224 and accompanying text *supra.*

[286] Dunavant Enterprises, Inc. v. Ford, 294 So. 2d 788, 792 (Miss. 1974) (trial court is without jurisdiction to entertain a motion for rehearing); Crocker v. Farmers & Merchants Bank, 293 So. 2d 444, 444 (Miss. 1974) (appeal divested lower court of its jurisdiction to modify decree).

[287] Riley v. Richardson, 258 So. 2d 419 (Miss. 1972) (motion to strike lower court's opinion and decree sustained).

XVII. SUMMONS

Once the appeal is perfected and notice to the court reporter has been given, summons must issue and be served on all non-joining co-parties and all opposing parties. As previously noted, all co-parties who do not join in perfecting the appeal will be summoned to join in the appeal by either the clerk of the trial court or the supreme court clerk.[288] The requirement that all non-joining potential appellants must be summoned is a procedural, rather than jurisdictional, requirement.[289] Thus, although the court may stay or dismiss the appeal for failure to summon all potential appellants,[290] its final judgment will not be set aside for failure to serve summons on the non-joining co-parties,[291] and a split appeal remains possible.[292] Conversely, the requirement that all opposing parties, *i.e.* potential appellees, must be summoned to the appeal is jurisdictional.[293] If summons is not issued and served on all opposing parties, and these parties do not otherwise participate in the appeal or waive process, a subsequent judgment of reversal or an order assessing costs will not be binding as to them.[294] The appellant who is faced with multiple opposing parties should, therefore, ensure that all of them are served with summons.

The mechanics of service of summons on both appellants and appellees are set forth by statute[295] and are routinely handled by the clerk of the lower court and the "sheriff of the proper county."[296] In the event that the sheriff or clerk of the lower court is unable to successfully complete service, the clerk of the supreme court is empowered to issue original and alias process for all parties.[297]

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[288] See Section V. *A. supra.*

[289] Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co., 167 Miss. 63, 65, 146 So. 889, 889 (1933).

[290] United States Fidelity & Guar. Co. v. Jackson, 123 Miss. 676, 691-92, 86 So. 456, 457 (1920); Tardy v. Rosenstock, 118 Miss. 720, 721, 80 So. 1, 1 (1918).

[291] Wilkinson v. Love, 149 Miss. 523, 533-34, 115 So. 707, 710 (1928) (validity of final judgment of the supreme court cannot be attacked on the ground that non-joining defendants had not been summoned).

[292] This possibility assumes that the appeal could still be perfected within the statutory period allowed. For example, an infant appellant may be allowed two years in which to perfect an appeal. MISS. CODE ANN. § 11-51-5 (Supp. 1976).

[293] Home Ins. Co. v. Watts, 229 Miss. 735, 754-55, 93 So. 2d 848, 850-51 (1957) (court was without jurisdiction to enter judgment against appellee not summoned).

[294] Johnstone v. Johnson, 248 So. 2d 444, 450-51 (Miss. 1971) (judgment against party-defendant not summoned to appeal in the supreme court held invalid); Home Ins. Co. v. Watts, 229 Miss. 735, 754, 93 So. 2d 848, 850 (1957) (judgment for costs against appellee not summoned held invalid).

[295] MISS. CODE ANN. §§ 11-51-17 (general provisions for summons), -55 (sheriff shall serve summons on the appellee or his attorney), -61 (if the appeal is not perfected during the term of court at which the judgment was rendered, clerk of the court from which the appeal is taken must issue summons to opposing party) (1972).

[296] *Id.* §§ 11-51-55, -61.

The summons to answer or join in the appeal will ordinarily be made returnable to the return day of the next term of court and will be valid if served at least ten days before the return day.[298] If less than ten days service of process is had on the opposing party, the summons will be effective for the next succeeding term of court.[299] The statutes provide that appeals from certain cases, *e.g.*, an appeal from an order denying a petition for writ of habeas corpus, are immediately returnable to the court regardless of the return day in other cases.[300]

There are presently two terms of the court, beginning on the second Monday of September and the first Monday of March.[301] The return days for all civil appeals are the first day of each of the two terms[302] and the first Mondays in January, May, July and November.[303] The return day for all criminal cases is the "Monday of any term first after the expiration of twenty days from the date of taking the appeal."[304]

XVIII. APPELLATE DOCUMENTS

A. *Assignment of Errors*

Although the assignment of errors is a separate document governed by Mississippi Supreme Court Rule 6, it is inextricably involved with the preparation and presentation of the brief.[305] Specifically, each assignment of error should draw the court's attention to the particular questions of substance or procedure upon which the appealing party relies in urging reversal. Although the court reserves the power to notice unassigned error,[306] in the absence of exigent circumstances, those errors not specifically assigned will not be considered and cannot be urged either in the brief or in oral argument.[307]

Basically, an assignment of error is a statement of a legal conclusion. It does not require the inclusion of factual circumstances which are best left to the argument supporting the conclusion in the brief which follows. Some degree of specificity is required, however, as the supreme court has held that an assignment of error stating that the lower court erred in sustaining every objection of the appellee and overruling all of the appellant's objections did not meet the specificity requirement of Rule 6.[308] Thus the appellant must state in the assignment of errors the grounds upon which overruled objections were made.[309] It is similarly improper to assign as error that all of the instructions granted by the lower court were erroneous without specifying in what respects they were incorrect.[310]

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[297] *Id.* §§ 11-51-17, -55.

[298] *Id.*

[299] *Id.* § 11-51-55.

[300] *Id.* § 11-3-3.

[301] *Id.* § 9-3-3.

[302] *Id.* § 11-3-1 (return days in civil cases shall be the first day of each term and such other days as may be designated by rule).

[303] MISS. SUP. CT. R. 8, app. I *infra* (adds additional return days of the first Monday of January, May, July and November).

[304] MISS. CODE ANN. § 99-35-125 (1972).

[305] See notes 313 through 326 and accompanying text *infra*.

[306] MISS. SUP. CT. R. 6(b), app. I *infra*.

[307] *E.g.*, Richardson v. Stokes, 254 Miss. 71, 72-73, 180 So. 2d 153, 153 (1965)(error not specifically assigned shall not be assigned except on request by the court).

The assignment of errors should be drawn as a blueprint upon which the brief itself can be constructed. The supreme court has made it clear that the arguments in the brief should be specifically directed to each assignment of error.[311] Compliance with this requirement can best be accomplished by incorporating the assignments of error as headings in the topical index of the brief and subsequently as subheadings in the body of the brief itself. The development of the argument in support of each alleged error should be contained under the appropriate subheading. This practice should ensure an orderly development of the appellant's thesis and a full treatment of each issue being appealed. It should be remembered, however, that a failure to cite authority in support of an assignment of error will result in the court's refusal to notice it.[312]

B. The Brief

The brief is the heart of the appellate process. Mississippi Supreme Court Rule 7,[313] while suggesting a basic format for the presentation of factual and legal arguments, leaves the contents of the brief to the sound discretion of the attorney preparing it. Rule 7 does, however, impose certain mechanical requisites. First, the details for clerical preparation set forth are exhaustive and should be consulted well in advance of the preparation of the final copy of the brief.[314] Indeed, the failure to abide by these provisions has been held to be sufficient reason to remand such noncomplying briefs.[315] Specifically, the cover page of each brief must contain the style and the number of the case, the designation of the document, *e.g.*, "BRIEF FOR APPELLANT," "BRIEF FOR APPELLEE" or "APPELLANT'S REBUTTAL BRIEF,"[316] and, if oral argument is requested, a statement to that effect.[317] Although there is no provision in the rules, the cover page should also include the names of the attorneys preparing the brief.

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[308] Niles v. Sanders, 218 So. 2d 428, 430 (Miss. 1969).

[309] Richardson v. Stokes, 254 Miss. 71, 73, 180 So. 2d 153, 153 (1965).

[310] Niles v. Sanders, 218 So. 2d 428, 430 (Miss. 1969).

[311] *See* Westminister Presbyterian Church v. City of Jackson, 253 Miss. 495, 502-03, 176 So. 2d 267, 270 (1965) (if specific direction is not made "[w]e will pass upon the assignments that we deem to merit discussion").

[312] Wood v. Gulf States Capital Corp., 217 So. 2d 257, 272-73 (Miss. 1968) (court assumes no error where the appellant has not cited any support for an assignment of error); E.L. Bruce Co. v. Brogan, 175 Miss. 208, 217, 166 So. 350, 352 (1936) (court declined to decide question unless fully assigned as error by appellant).

[313] MISS. SUP. CT. R. 7, app. I *infra*.

1. Topical Index

Each brief must also contain a topical index setting forth the separate points of law to be argued in the body of the brief.[318] Each point of law should be summarized in a single concise statement. In many cases, the appellant may simply track the language used in the separately filed assignment of errors. For clarity, the headings of the appellee's topical index should directly address the appellant's headings and may employ the same language restated in the negative. Each point should then be incorporated as a topic heading in the format of the brief proper. The authorities cited in support of each heading in the body of the brief should be arranged alphabetically under each point in the topical index with reference to the page number upon which such authority is cited. Although it is not expressly required by the language of Rule 7(g), the appearance and serviceability of the topical index is enhanced by dividing the authorities under each heading by cases, statutes, texts and other authorities.[319]

Along with the topical index, Rule 7(g) also requires a complete alphabetical index of all authorities relied upon in the brief with reference to the pages upon which those authorities are cited. Again, division of the authorities into the four categories suggested above improves the usefulness and appearance of the index.

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[314] *Id.*

[315] Bank of Roxie v. Lampton, 103 Miss. 398, 399, 60 So. 561, 561-62 (1913) (brief single-spaced throughout; dicta to the effect that quoted matter, although indented, should also be double-spaced); City of Water Valley v. State, 103 Miss. 314, 315, 60 So. 325, 327 (1913) (brief partly in black ink and partly in red ink); Grace v. Floyd, 103 Miss. 201, 206, 60 So. 135, 135 (1912) (brief typed on letterhead stationery).

[316] MISS. SUP. CT. R. 7(g), app. I *infra.*

[317] *Id.* 7(e), app. I *infra.*

[318] *Id.* 7(g), app. I *infra.*

[319] There are no reported cases in which an improperly indexed brief was stricken. The supreme court has, however, commented unfavorably on counsel's failure to adhere to the rule in that regard. Barcroft v. Armstrong, 198 Miss. 565, 586, 21 So. 2d 817, 822 (1945) ("omission properly to index the testimony and some of the briefs in disregard of Rule 7 has retarded our progress toward the truth"); Shumpert v. Lee County, 197 Miss. 513, 527, 20 So. 2d 82, 84 (1944) ("We have given them all painstaking care, a task augmented not inconsiderably by a failure of counsel to observe the suggestions of Rule 7(2).").

2. Statement of the Case

The statement of the case suggested in Rule 7(b) is sometimes confused with the mandatory statement required by Rule 7(f). Although Rule 7(b) only suggests that a statement of the case be included within the brief, the court has accorded the rule considerable weight and has held that an appellee who fails to include such a statement cannot complain if the court accepts the appellant's statement of the case as true.[320] To the contrary, the mandatory statement of Rule 7(f), while included in the provisions of the rule for briefs, is an entirely separate document from the brief itself and should contain a separate certificate of service. Although there are apparently no cases dealing with an appealing party's failure to file a separate statement under Rule 7(f), it is conceivable that, since such a filing is required by the rule governing briefs, the failure to do so might be construed as a failure to properly file a brief and would be accorded the attendant consequences.[321] It should also be noted that a cross-appellant is an "appealing party" and is also required to submit a statement of the case under Rule 7(f).[322]

3. Time for Filing

Under Rule 7(a), the appellant's brief must be filed not later than forty days after the record is filed in the office of the clerk of the supreme court.[323] The clerk will, as a matter of course, notify the attorneys for the parties of the filing and of the dates upon which the respective briefs will be due. Failure of the clerk to dispatch such notice or failure of the attorneys to receive it does not, however, excuse the timely filing of briefs. The appellee's brief is due sixty days from the date that the record is filed and the appellant's rebuttal brief is due seventy days after the filing.[324]

Rule 7(a) further provides that the appellant's failure to file a brief within the specified time will result in a dismissal of the appeal on motion of either the appellee or the court itself.[325] Where neither an assignment of error nor a brief for the appellant is filed, the appeal will be dismissed.[326] In *Ford v. City of Pascagoula,*[327] however, where the assignment of errors had been correctly filed and the brief itself, although late, was filed, the court invoked the power to relax its own rules.

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[320] Somerville v. Anderson, 202 Miss. 157, 166, 30 So. 2d 686, 688 (1947); Frederic v. Board of Supervisors, 197 Miss. 293, 301, 20 So. 2d 671, 671 (1945).

[321] See notes 333 through 337 and accompanying text *infra*.

[322] Miss. Sup. Ct. R. 7(f), app. I *infra*.

[323] *Id.* 7(a).

[324] *Id.*

[325] *Id.*

> It has not been the policy of this Court to strike a brief on account of the fact that it is filed late where we are satisfied that the delay was due to causes beyond the control of the attorney filing the same. But we allow the opposing counsel sufficient time thereafter to file a reply brief.[328]

The court has also established a standard of review for cases where the appellee fails entirely to file a brief. In *W.T. Raleigh Co. v. Armstrong,*[329] the court adopted a balancing test whereby if the appellant's brief provides a clear statement of facts and an authoritative legal argument supporting an apparent case of error, the court will not consider itself obligated to wade through a complex record to avoid the force of the appellant's argument. The court will not, however, disregard the presumption of validity inherent in the judgment when the record is such that it can be conveniently examined and reveals a sound, readily perceivable basis upon which the findings of the lower court can be affirmed.[330] Although the standard promulgated in *W.T. Raleigh Co.* has been applied with varying emphasis in a number of factual situations, its application has consistently led the court to construe the appellee's failure to file a brief as a confession of error dictating reversal. In only one reported case, *First Mobile Home Corp. v. Little,*[331] did application of the test not lead to reversal. In *Little,* the appellant's co-defendant, who had been absolved from any liability, failed to file a response to a cross-appeal against her. Despite recognition that the failure to file a brief is tantamount to a confession of error, the court nevertheless held that close examination of the disposition of the direct appeal counseled affirmance of the lower court's judgment with regard to the cross-appellee.[332] As the only exception to a line of cases beginning with establishment of the standard in 1932, the case will undoubtedly be of limited value in urging similar results under different circumstances.

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[326] Martin v. State, 215 So. 2d 430, 430 (Miss. 1968) (dismissed citing Rule 7); Canal Ins. Co. v. Howell, 248 Miss. 678, 690, 160 So. 2d 218, 223 (1964) (dismissed citing Rules 6(1) and 7(1)); Rodgers v. Bolden, 10 So. 2d 551, 551 (Miss. 1942) (dismissed citing Rule 20).

[327] 228 Miss. 265, 87 So. 2d 558 (1956).

[328] *Id.* at 270, 87 So. 2d at 559.

[329] 165 Miss. 380, 140 So. 2d 527 (1932). Under Rule 7(a) briefs not timely filed by the appellee may be stricken on motion of either the appellant or the court itself. It seems likely, however, that the same policy governing the late filing of an appellee's brief will be followed as in the instance of the tardy appellant's brief in Ford v. City of Pascagoula, 228 Miss. 265, 270, 87 So. 2d 558, 559 (1956). *See* notes 327 & 328 and accompanying text *supra.*

[330] 165 Miss. at 382, 140 So. at 528.

[331] 298 So. 2d 676 (Miss. 1976).

Upon the appellee's failure to file a brief and a determination that the failure is to be taken as a confession of error, the court may either reverse and remand or reverse and render.[333] Although the court has historically been inclined to simply remand the case,[334] it has, with almost equal frequency, rendered a judgment against the defaulting appellee.[335] Indeed, there is a discernible trend which indicates a growing inclination by the court to render cases which have not been briefed.[336] These decisions are, at the least, a manifestation of the supreme court's less than sympathetic attitude toward attorneys who fail to abide by its procedural requirements.[337]

4. Length

The appellant's brief and rebuttal brief taken together may not exceed fifty pages, nor may the appellee's brief alone exceed fifty pages.[338] The court may, within its discretion and on timely motion with cause shown, relax the 50-page limitation for either party. Absent such a motion, however, any portion of the brief in excess of fifty pages may be stricken.[339]

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[332] *Id.* at 684.

[333] Anderson v. Rieveley, 218 Miss. 211, 213-14, 67 So. 2d 249, 250 (1953).

[334] Transcontinental Gas Pipe Line Corp. v. Rogers, 284 So. 2d 304, 305 (Miss. 1973); Gates v. Green, 214 So. 2d 828, 832 (Miss. 1968); Griffin v. Breckenridge, 204 So. 2d 855, 855 (Miss. 1967); United States Fidelity & Guar. Co. v. State, 204 So. 2d 852, 853 (Miss. 1967); Anderson v. Rieveley, 218 Miss. 211, 216, 67 So. 2d 249, 251 (1953); Ramsay v. Milner, 192 Miss. 120, 121, 4 So. 2d 889, 889 (1941); Columbus & G. Ry. v. Basson, 176 So. 600, 600 (Miss. 1937); W.T. Raleigh Co. v. Armstrong, 165 Miss. 380, 382, 140 So. 527, 528 (1932).

[335] Green v. Green, 317 So. 2d 392 (Miss. 1975); Westinghouse Credit Corp. v. Deposit Guar. Nat'l Bank, 304 So. 2d 636, 637 (Miss. 1974); Jackson v. Walker, 240 So. 2d 606, 606 (Miss. 1970); Charles F. Hayes & Assocs. v. Blue, 233 So. 2d 127, 128 (Miss. 1970); Lawler v. Moran, 245 Miss. 301, 302, 148 So. 2d 198, 199 (1963); Gulf, M. & O.R. Co. v. Webster County, 194 Miss. 660, 662, 13 So. 2d 644, 645 (1943).

[336] *See* Green v. Green, 317 So. 2d 392, 393 (Miss. 1975) (appellee's failure to file briefs resulted in the case being reversed and rendered); Westinghouse Credit Corp. v. Deposit Guar. Nat'l Bank, 304 So. 2d 636, 637 (Miss. 1974) (same); Jackson v. Walker, 240 So. 2d 606, 606 (Miss. 1970) (same); Charles F. Hayes & Assocs. v. Blue, 233 So. 2d 127, 128 (Miss. 1970) (same).

[337] For example, failure to file a brief cannot be cured by counsel's appearance for oral argument. Charles F. Hayes & Assocs. v. Blue, 233 So. 2d 127, 127-28 (Miss. 1970).

[338] MISS. SUP. CT. R. 7(c), app. I *infra.*

[339] Stevenson v. State, 312 So. 2d 10, 12 (Miss. 1975) (since the appendix is considered

5. Substance

The substantive portion of the appellate brief is, of course, impossible to concretely define. Justice Griffith's characterization is, however, a most helpful guide.

> The essentials of an appellate brief may be summarized as a condensed statement of the party's case, together with a like statement of the propositions of law which the party desires to have applied thereto, with the reasons and authorities which sustain them. In this important step in appellate procedure it is seldom that it is any more permissible to omit the authorities and their application than it is to omit the condensed statement of the case.[340]

C. Abstract of the Record

Rule 41 requires concurrent submission of an abstract or abridgment of the record with the brief. The abstract may be filed as a part of the brief itself or as a separate document. If it is incorporated in the brief, the space consumed is not charged against Rule 7's fifty-page limitation.[341] For all but the least complex records, however, it is preferable to file the abstract as a separate document to preserve clarity of organization.

The abstract must contain a concise, non-partisan condensation of all material in the record necessary for the determination of the question raised on appeal. Again, the professional discretion of the individual attorney determines which portions of the record are necessary for inclusion. This discretion must not, however, be exercised in such a way that the abstract is converted into an adversary document. Even though the burden of abstract preparation falls squarely on the shoulders of the appellant's attorney, it is his duty to abide by both the spirit and the letter of Rule 41 in producing a fair and unbiased summary of the proceedings. Should the appellee's attorney suspect that his opponent has failed to abide by this duty, three possible courses of action are apparently available. First, a supplemental abstract may be filed which points out the defects in the appellant's abstract and provides a summary of any relevant material which was omitted.[342] The court will,

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part of the brief, brief exceeded page limit and motion to strike was granted); Southern Farm Bureau Cas. Ins. Co. v. National Bureau of Cas. Underwriters, 254 Miss. 445, 452-53, 181 So. 2d 154, 156 (1965) (reply brief is considered in computing the page limit).

[340] Johnson v. State, 154 Miss. 512, 512-13, 122 So. 529, 529 (1929). *See also* Dozier v. State, 247 Miss. 850, 851-53, 157 So. 2d 798, 798-99 (1963) (appellant's brief was "only about four pages . . . ." and without any citation of authority).

[341] Miss. Sup. Ct. R. 41(c), app. I *infra.*

[342] *Id.* 41(b).

however, strike a document in the nature of a counter-abstract filed by the appellee if he fails to show that the appellant's abstract was insufficient. Second, if the appellant's abstract is totally inadequate, the appellee may file a motion requiring the appellant to cure the deficiencies himself.[343] Third, the appellee may file a motion to dismiss the appeal if no abstract is filed or if the abstract "is so deficient it amounts to no abstract"[344] and the deficiency is so apparent that no examination of the record is required.[345]

Recently, in *Hamilton v. Poteet,*[346] Justice Sugg, speaking for the court, expressed dissatisfaction with the quality of abstracts habitually submitted by appellants. In an effort to establish a standard format to be observed by appellants' counsel, Justice Sugg not only presented an example of a thorough outline in the body of the opinion itself,[347] but also articulated in detail the elements that each portion of the abstract should contain.[348] Specifically, if the abstract is divided into three parts, as suggested by the court, the first portion should summarize pleadings,[349] the second should summarize proceedings below through rendition of the judgment,[350] and the third should address all matters arising after rendition of judgment.[351]

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[343] Stevenson v. State, 312 So. 2d 10, 12 (Miss. 1975).

[344] Hamilton v. Poteet, 343 So. 2d 1222 (Miss. 1977) (en banc), *modifying* Neville v. Kelso, 242 So. 2d 871 (1970) (motion to strike abstract will not lie). The court based its modification on the principle that since preparation of a proper abstract is the duty of an appellant, he should not be allowed to shift the burden of preparation to the appellee by simply neglecting to perform that duty. *Id.* at 1223.

[345] *Id.*

[346] 343 So. 2d 1222 (Miss. 1977).

[347] I. PLEADINGS
    DECLARATION OF PLAINTIFF
    ANSWER OF DEFENDANT OR DEFENDANTS
    PROCESS (IF AT ISSUE ON APPEAL)

II. TRIAL
    A. MOTIONS HEARD SEPARATELY
        MOVANT'S EVIDENCE ON MOTION
        1. General exhibits and stipulations
        2. James Smith, defendant
        RESPONDENT'S EVIDENCE ON MOTION
        1. Robert Jones, plaintiff
        RULINGS OF COURT ON MOTION
    B. PLAINTIFF'S DIRECT CASE
        1. General exhibits and stipulations
            Plat of scene of accident
        2. Robert Jones, plaintiff
            Exhibits 1, 2, 3 Photographs
        3. John Doe, Eyewitness
        4. Richard Sanford, examining physician
        MOTION FOR DIRECTED VERDICT AND RULING OF COURT (ONLY IF AT ISSUE ON APPEAL)
        DEFENDANT'S CASE
        1. General exhibits and stipulations
        2. James Smith, defendant
        3. Charles Turley, eyewitness
        4. William Cartledge, medical expert
        PLAINTIFF'S REBUTTAL
            (Here list witnesses as above)
        REQUEST FOR PEREMPTORY INSTRUCTION AND RULING OF COURT
            (Only if at issue on appeal)

A table of contents for the abstract, though not required, is helpful both as a reference tool and as a method of organizing the document itself. An excellent starting point in preparing an abstract is the index or table of contents at the front of the record previously prepared by the court reporter. The court reporter's table of contents can be used as a checklist in reviewing the record to determine what portions are to be abstracted. Once the appropriate portions have been selected, the author can assemble the table of contents of the abstract itself for use as an outline in summarizing the material portions of the record in an orderly sequence. Additionally, counsel should summarize pleadings by reference to their nature, material allegations of the plaintiff and the defendant, and any affirmative defenses or pleas in bar.[352] It is also helpful to include the date of filing.

Rule 41 requires that testimony be summarized in the first person.[353] This can best be accomplished by the author assuming the identity of the witness and projecting himself onto the witness stand to relate in first person narrative the substance of the recorded testimony. Attorneys preparing abstracts should note that the first person requirement applies only to testimony and does not necessitate the style of the overzealous solicitor who began his abstract with "I am a Bill of Complaint." Where no new matter was elicited on cross-examination, the author

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INSTRUCTIONS
(If at issue, give instruction, objection and ruling of court)
VERDICT OF JURY AND JUDGMENT

III. POST JUDGMENT PROCEDURES
MOTIONS
1. Judgment n. o. v.
2. New trial
1. Additur or remittitur
(Any other post judgment motions should be included if at issue on appeal)

Id. at 1224.

[348] *Id.* at 1225-26.

[349] *Id.* at 1225.

[350] *Id.*

[351] *Id.*

[352] *Id.*

[353] Litton Sys., Inc. v. Burrows, 321 So. 2d 297, 298 (Miss. 1975).

may avoid redundancy by a simple statement to that effect. If the direct testimony was recanted or qualified, however, the relevant responses should be included and the testimony elicited on cross-examination should be clearly identified as such. Exhibits necessary to the understanding of the testimony should be reproduced as fully as practicable in the body of the abstract itself. In addition, textual continuity and orientation are aided by brief reference in the abstract to the portions of the record which have been omitted.

The court's opinion in *Hamilton v. Poteet*[354] and the amendment of Rule 41 to require an abstract in all cases presented to the court have placed a new emphasis on the role of the abstract in the preparation of an appellate case. As the court noted in *Litton Systems, Inc. v. Burrows,*[355] those cases in which abstracts were required under the original Rule 41 had produced a discernibly higher quality of appellate practice. In light of that observation, it may behoove the appellant's attorney to reassess the importance he has previously ascribed to the abstract. Abstracts are too often pasted together at the last minute while the secretary is typing the final pages of the brief. As a result, the abstract is conformed to the brief when, if the proper procedure is followed, the brief should be a logical extension of the record as condensed in the abstract. Viewed from this perspective, the abstract becomes a useful tool for both the bench and the bar and should not be relegated to the status of an afterthought toward procedural compliance.

XIX. ORAL ARGUMENT

Under the supreme court's present schedule, oral argument requested under Rule 7(e) is heard before a panel of three justices on Tuesday through Thursday during those weeks in which the court is in session. Each side is allowed thirty minutes to present its case, although in extraordinary circumstances and upon timely motion, the court may allow additional time for argument of counsel.

Although cases submitted on the briefs without oral argument are given fully as thorough a review by the court, most attorneys feel that they have represented their clients less than adequately if they do not appear to argue the case personally. Oral argument, however, while providing valuable opportunity for dialogue between the bench and counsel, too often degenerates into little more than a restatement of the points already thoroughly covered in the briefs. From this standpoint, it seems that the court should consider adopting a rule limiting oral argument to those cases which it feels merit such treatment. Such a limitation would reap double benefits through not only allowing the justices to devote time spent on the bench to only those cases which require greater consideration, but also by removing current pressures placed on attorneys to avoid the stigma attendant to submitting the case only on the briefs by always requesting oral argument.

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[354] 343 So. 2d 1222 (Miss. 1977).

[355] 321 So. 2d 297, 298 (Miss. 1975).

Recently, the supreme court has assumed greater and refreshing assertiveness in promulgating rules designed to enhance the administration of justice in Mississippi.[356] This assertiveness first surfaced in 1975 with the court's decision in *Newell v. State*,[357] holding unconstitutional those statutes which purported to regulate the judiciary's role in dispensing impartial justice.[358] The court has also used its rulemaking power to uphold Rule 14 of the Uniform Rules of the Circuit Courts of Mississippi[359] and, in *Brown v. City of Water Valley*,[360] to tighten its control over the trial court reporter's filing of the transcript. Further, the court has construed section 9-3-41, which requires particular supreme court opinions to be published,[361] as simply advisory in nature.[362]

XX. STANDARDS OF REVIEW FOR TRIERS OF FACT

The outcome of an appeal, of course, hinges upon the record of the proceedings in the trial court. Consequently, the participating attorneys should view the record not as an end product of the litigation, but as part of the foundation upon which an appeal is to be prosecuted or defended. To ensure a meaningful right to appeal, preparation for trial should include a total understanding of those matters the record must contain from the perspective of both the successful and the unsuccessful litigant. Although the ultimate goal of trial litigation is success at the trial level, the conduct of the proceedings must be simultaneously directed toward preservation of the litigant's substantive and procedural rights on appeal.

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[356] At least a portion of the court's newly recognized aggressiveness was drawn from an article written by a respected member of the Mississippi Bar, Lawrence J. Franck, in which he forcefully and cogently urged that the supreme court take the reins of the state judiciary in a more effective manner. Franck, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform*, 43 MISS. L.J. 287 (1972).

[357] 308 So. 2d 71 (Miss. 1975), *noted in* 46 MISS. L.J. 849 (1975).

[358] *Id.* at 77. The court held that MISS. CODE ANN. §§ 11-7-155 and 99-17-35 (1972) were unconstitutional to the extent that they denied the trial judge the right to instruct the jury as to the law. 308 So. 2d at 77-78.

[359] Scott v. State, 310 So. 2d 703, 705-06 (Miss. 1975).

[360] 319 So. 2d 649, 651 (Miss. 1975) (issued writ to court reporter to prepare transcript).

[361] MISS. CODE ANN. § 9-3-41 (1972) provides:

> In all cases settling important principles, in cases to be remanded, and in all cases where the judgment or decree of the court below is reversed, and in all felonies where the punishment prescribed is ten years or more, the opinion of the supreme court shall be in writing stating the reasons upon which the decision is made; and the opinion shall be recorded by the clerk in a well-bound book to be kept for that purpose.

[362] Morea v. State, 329 So. 2d 527, 527 (Miss. 1976).

Because of the presumption of validity which attaches to the rulings and judgment of the trial court,[363] the successful trial litigant, as the appellee, enjoys a material advantage over the appellant. As a result, this presumption must be the focal point of the appellant's attack and, unless it can be overcome, the judgment will be allowed to stand. To successfully defeat the presumption, the appellant must establish both that an error was committed by the trial court and that the error complained of was prejudicial to his rights.[364] A judgment will not be reversed for error committed in the trial court unless the appellant can show affirmatively that the resulting judgment is a miscarriage of justice.[365]

The supreme court will not interfere with a verdict on the facts unless it finds with complete confidence that the verdict is without substantial support of believable evidence.[366] In addition, where a verdict is reached on the basis of conflicting evidence, the ultimate resolution of that conflict by the trier of fact is binding on the court.[367] The court will consider the evidence in the record in the light most favorable to the appellee and accept all that was proved or reasonably tended to be proved, either directly or by reasonable inference, in support of the appellee's case.[368] While there is no precise formula for determining when the court will interfere with a finding of fact by the lower court, a jury verdict will usually not be disturbed on appeal unless the evidence weighs so strongly against the verdict as to indicate that the jury was moved by passion, prejudice or some other improper influence.[369]

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[363] *E.g.,* Shelton v. Kindred, 279 So. 2d 642, 644 (Miss. 1973); Rayner v. Lindsey, 243 Miss. 824, 837, 138 So. 2d 902, 908 (1962).

[364] Davis v. Agents Fin. Corp., 249 Miss. 839, 846, 164 So. 2d 449, 452 (1964) (incorrect choice in form of pleading used at trial level was not prejudicial error toward appellant); Foster v. Mississippi State Highway Comm'n, 244 Miss. 57, 67-68, 140 So. 2d 257, 270-71 (1962) (no prejudicial error to appellants where they failed to submit testimony of a witness to record of eminent domain proceeding).

[365] Miss. Sup. Ct. R. 11, app. I *infra*; *e.g.*, Griffin v. Holliday, 233 So. 2d 820, 823 (Miss. 1970) (appellant was harmed by erroneous instruction pertaining to definition of assumption of risk in an automobile accident case).

[366] Hall Eng'r. Constr. Co. v. Jones, 186 So. 2d 773, 774 (Miss. 1966) (affirmance of jury award of damages based solely on factual issues and supported by ample evidence); Baudry v. Faulkner Concrete Pipe Co., 244 Miss. 669, 672, 145 So. 2d 468, 469 (1962) (jury verdict supported by substantial factual evidence); Tri-State Transit Co. v. Moore, 188 Miss. 722, 724-25, 196 So. 231, 232 (1940) (verdict affirmed even though court had grave suspicion that several of appellee's witnesses were not telling the truth since some very unusual stories "carry within themselves considerable evidence of their integrity").

[367] Gee v. Rimmer, 188 Miss. 460, 468, 145 So. 342, 344 (1940); Saenger Theatres Corp. v. Herntorn, 180 Miss. 791, 799-800, 178 So. 86, 87 (1938).

[368] *E.g.,* McCollum v. Randolph, 220 So. 2d 310, 312 (Miss. 1969) (court accepted evidence most favorable to appellee to conclude that jury verdict releasing him from liability was proper); Spell v. Ruff, 217 So. 2d 7, 10 (Miss. 1968) (accepting facts most

Although the court has appeared at times to vary the standard to be applied in determining whether a jury verdict should be set aside,[370] the general rule is that the verdict must be against the overwhelming weight of the evidence. The court itself has recognized that it has employed inconsistent terminology regarding the standard, and it has emphasized that its varying expressions should be analyzed within the different circumstances presented by each case:

> Other expressions have been used in the history of this court—such as against the great preponderance, against the weight, contrary to overwhelming weight, of the evidence.
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> . . . .
>
> But, aside from whether the words used define the rule with precise exactitude, the reversal is based upon the comparative weight and effect of the evidence on behalf of appellant and appellee, and the opinion summarizes that evidence. The comparison speaks for itself.[371]

This is in keeping with the court's traditional dissatisfaction with attempts by attorneys to deal semantically with legal abstractions and its warnings against ascribing any fixed meaning to particular words chosen to formulate standards of review for triers of fact.[372]

The decision of a court sitting as a trier of fact is to be accorded the same weight and validity as a verdict returned by a jury and will

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favorable to appellee, jury verdict in wrongful death action that appellee acted as a reasonably prudent man was proper).

[369] Green v. Pendergraft, 253 Miss. 891, 894-900, 179 So. 2d 831, 836 (1965) (fact that juror was close personal friend of appellee would not support appellant's motion for mistrial); Independent Life and Accident Ins. Co. v. Mullins, 252 Miss. 644, 651, 173 So. 2d 663, 666 (1965) (nothing to indicate jury was moved by passion or prejudice).

[370] Hubbard v. Morris, 275 So. 2d 858, 860 (Miss. 1973) (verdict held simply "contrary to the weight of the evidence").

[371] Montgomery Ward & Co. v. Windham, 195 Miss. 848, 862, 17 So. 2d 208, 209 (1944) (en banc) (citation omitted).

[372]
> The Court has never attempted to prescribe any elaborate formula, adequate to meet all cases, as to when a verdict will be considered against or contrary to the great or overwhelming weight of the evidence. Obviously it would be as nearly impossible to do so as to attempt to define a reasonable doubt—not to mention other familiar phrases in daily use in the law.
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> . . . .
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> At last, the question is: Can the Court say with confidence that the verdict is manifestly against all reasonable probability; that manifestly it has not responded to reason upon the evidence produced?

Faulkner v. Middleton, 186 Miss. 355, 365-67, 190 So. 910, 910-11 (1939).

not be disturbed unless it appears to be manifestly wrong.[373] Similarly, a chancellor's findings of fact are to be sustained unless they are manifestly erroneous. Again, there is no magic in the language used to determine when such findings will be reversed.

> This Court has used different expressions to describe the conditions under which it is its duty to reverse the chancellor on his findings of fact—such as that the finding is manifest error, clearly erroneous, plainly or manifestly wrong, against the great preponderance, or overwhelming weight, of the evidence.[374]

While it is helpful for the appellate attorney to be conversant with the judicial vocabulary employed in defining the appropriate standards of review, that vocabulary is demonstrably and necessarily imprecise. Instead, emphasis is best placed on arguments relating to the presence or absence of conflicting testimony, the credibility of witnesses and the reasonableness of inferences that might be drawn from the evidence adduced at trial.

XXI. Decision, Judgment and Petition for Rehearing

In cases where oral argument has been requested, the cause is submitted to the court for its consideration upon completion of the argument. Presently a cause is initially considered by a panel of three justices[375] and will only be considered by the full court, or "en banc" in three cases: (1) if the three justices cannot reach a unanimous decision; (2) the decision of the panel conflicts with a prior decision of the court or any division thereof; or (3) the cause is "of such importance" that it merits en banc consideration.[376] Decisions of the court are handed down on Wednesdays.

Since the court has declared that the statute[377] requiring written opinions is merely advisory[378] it has promulgated its own rules as to when an opinion will issue.[379] As a result, a decision may either be accompanied by a written opinion or may simply be affirmed or reversed without opinion, *i.e.* "per curiam."[380] Generally, a per curiam decision affirms the judgment of the lower court. Even those cases which merit a written opinion may or may not be published.[381] The "Standards for Publication" set forth in Rule 43 are intended not only to allow the individual justices to devote more time to those cases they deem "important," but also to ease the burden on the reporter system by withholding those opinions which are merely duplicative of existing law. Thus, the rule provides that unpublished opinions are to be filed in the supreme court clerk's office and are not to be printed in the reporter system or thereafter used by the court or litigants.[382]

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[373] Hall v. State *ex rel.* Waller, 247 Miss. 896, 903, 157 So. 2d 781, 784 (1963) (trial judge's finding affirmed by supreme court weighing same considerations as if it had been decided by a jury); Frizell v. Guthrie, 222 Miss. 501, 76 So. 2d 361, 364 (1955) (circuit court reversed and the finding of the county court, the trier of fact, affirmed since it could not be said that the county court's decision was manifestly wrong).

[374] Gerard v. Gill, 195 Miss. 726, 732, 15 So. 2d 478, 480 (en banc), *modified on other grounds,* 195 Miss. 733, 15 So. 2d 916 (1943) (en banc).

[375] Miss. Sup. Ct. R. 35(b), app. I *infra; see* Russell v. State, 312 So. 2d 422, 424 (Miss. 1975) (supreme court rule authorizing three justice panels held not violative of state constitution), *noted in* 46 Miss. L.J. 863 (1975).

[376] Miss. Sup. Ct. R. 35(b), app. I *infra.*

[377] Miss. Code Ann. § 9-3-41 (1972).

[378] Morea v. State, 329 So. 2d 527, 527 (Miss. 1976).

The judgment rendered by the supreme court is not final and binding until a petition for rehearing is ruled on or, if no petition is filed, until the time for filing the petition has passed.[383] Simply stated, the petition for rehearing is a post-decision pleading that gives any party to the appeal a "second chance" by allowing him to formally assert to the court that its decision as rendered erred as a matter of law or fact.[384] The petition for rehearing has replaced in name the "suggestion of error," presumably because the court did not like the inference that it erred to begin with. However, the term petition for "rehearing" is in reality a misnomer since there is rarely any oral reargument of the cause; it should instead be considered more akin to a "petition for reconsideration."

As the sole authority for the petition for rehearing, Rule 14 requires that the petition and an accompanying brief be filed within fifteen days after a decision is handed down on the merits of a case or motion. Any party[385] to the appeal, appellant and appellee alike,[386] has an automatic right to file a petition for rehearing without obtaining leave of the court.[387] A party who wishes to file a petition for rehearing must, within the 15-day period, file either the petition itself and an accompanying brief, or a motion for additional time in which to file them.[388] Absent either of these timely steps, no petition or motion for rehearing will be considered.[389] In any event, only one petition for rehearing may be filed by a party.[390] The party or parties opposing the petition for rehearing need not file a reply to the petition unless the court requests a reply.[391]

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[379] MISS. SUP. CT. R. 43, app. I *infra.*

[380] *Id.* 43(1).

[381] *Id.* 43(3).

[382] *Id.* 43(5).

[383] Decker v. Bryan Bros. Packing Co., 249 Miss. 6, 10, 162 So. 2d 648, 650 (1964) (employer liable for statutory workmen's compensation penalty for failure to make payment of award within 14 days after the decision became final); White v. State, 190 Miss. 589, 595, 195 So. 479, 482 (1940) (time for statutory requirement that supreme court clerk certify cause to clerk of court to which the cause is remanded does not begin to run until the judgment is final).

[384] MISS. SUP. CT. R. 14(a), app. I *infra.*

[385] Amicus curiae may file a petition for rehearing if the court's permission is first obtained. *See* Wofford v. Cities Serv. Oil Co., 239 So. 2d 916, 916 (Miss. 1970) (amicus curiae petition for rehearing refused since court's permission not previously obtained); New Orleans Baptist Theological Seminary v. Lacy, 219 So. 2d 673, 673 (Miss. 1969) (amicus curiae petition refused because issues had been fully argued).

[386] MISS. SUP. CT. R. 14(a), app. I *infra*; *see, e.g.*, Shearron v. Shearron, 219 Miss. 66, 66, 69 So. 2d 801, 801 (1954) (per curiam).

The petition itself should seek to vacate, amend or modify the court's decision on the ground of an error of fact or law already raised and addressed in the decision itself.[392] The court will not consider a matter raised and presented for the first time by the petition for rehearing[393] unless the claimed defect is jurisdictional.[394] In its disposition of the petition, the court may deny or sustain the petition in whole or in part,[395] or withdraw its former decision and substitute a new decision.[396]

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[387] MISS. SUP. CT. R. 14, app. I *infra;* White v. State, 190 Miss. 589, 595, 195 So. 479, 482 (1940).

[388] Arnold v. Spears, 65 So. 2d 296, 296 (Miss. 1953) (suggestion of error filed more than 30 days after rendition of decision could not be entertained since motion for additional time not filed within the original 15 days).

[389] *Id.* An opposing party should respond to an untimely petition for rehearing with a motion to strike. *See, e.g.*, Wilder v. Currie, 231 Miss. 461, 487, 97 So. 2d 384, 386 (1957) (appellant's motion to strike appellee's untimely petition sustained).

[390] Carter v. Berry, 243 Miss. 321, 378-79, 142 So. 2d 13, 14 (1962) (motion for permission to file a second suggestion of error overruled); Snowden v. Webb, 217 Miss. 664, 683, 67 So. 2d 251, 252 (1953) (second suggestion of error dismissed). *But see* Home Ins. Co. v. Watts, 229 Miss. 735, 753, 93 So. 2d 848, 848-49 (1957) (second petition for rehearing allowed under unusual circumstances where question of jurisdiction involved).

[391] MISS. SUP. CT. R. 14(c), app. I *infra.*

[392] *Id.* 14(a).

[393] Rigdon v. General Box Co., 249 Miss. 239, 246-47, 162 So. 2d 863, 864 (1964) (amount of compensation benefits in workmen's compensation action could not be raised for the first time by suggestion of error); Prince v. Nicholson, 229 Miss. 718, 729, 92 So. 2d 375, 376 (1957) (issue of damages cannot be raised for the first time on suggestion of error); Hays Fin. Co. v. Bailey, 56 So. 2d 76, 76 (Miss. 1952), *appeal dismissed,* 343 U.S. 959 (1952) (issue of unconstitutionality cannot be raised for the first time on suggestion of error). *But see* New & Hughes Drilling Co. v. Smith, 219 So. 2d 657, 661-62 (Miss. 1969) (where important decision was handed down subsequent to filing assignment of errors, issue could be raised for first time on motion to correct judgment).

[394] *See* Home Ins. Co. v. Watts, 229 Miss. 735, 753, 93 So. 2d 848, 849-50 (1957) (failure to serve summons on appellee raised for the first time on suggestion of error).

[395] *See, e.g.*, Reed v. Evans, 342 So. 2d 290, 294 (Miss. 1976) (petition denied); Wilder v. Currie, 231 Miss. 461, 487, 97 So. 2d 384, 386 (1957)(appellant's suggestion of error sustained in part and overruled in part).

[396] *See, e.g.*, Daniels v. State, 341 So. 2d 918, 919 (Miss. 1977) (opinion on rehearing substituted and original opinion withdrawn).

XXII. DAMAGES AND INTEREST ASSESSED AGAINST UNSUCCESSFUL APPELLANTS

In discussing the advisability of an appeal with a client, counsel should not overlook the provisions of Section 11-3-23 of the Code[397] which imposes a 5% damage assessment against the unsuccessful appellant. These are damages in addition to the 8% statutory interest[398] on the judgment of the lower court, but are computed only on the principal judgment and not on the interest accruing subsequent to its rendition.[399] The statute applies to appeals from judgments for the possession of real or personal property, appeals from judgments dissolving an injunction, and appeals from judgments for the sale of property, as well as judgments for a sum of money.[400] It is, of course, highly penal and will be strictly construed.[401] Moreover, the statute applies only to the unsuccessful appellant, although the court has reserved its ruling on whether a cross-appellant who prosecutes his appeal after the direct appeal has been dismissed may be held liable for the statutory damages.[402] Finally, the affirmance of the judgment appealed from must be unconditional for the damages to be assessed[403] and affirmance on condition of remittitur will not support assessment of statutory damages.[404]

XXIII. CONCLUSION

Ideally, an appeal to the Mississippi Supreme Court should involve little more than initiating the mechanical steps of the appellate process and thereafter adhering to the relatively well-defined procedures. The basic simplicity of the procedure itself should allow counsel to direct his attention toward achieving persuasiveness and accuracy in the brief and argument. To heighten his prospects for success on appeal, however, counsel should try the cause in the lower court with a favorable verdict as his goal, but also with an appeal always in mind. In this vein, if any particular facet of an appeal deserves special emphasis, it is the preservation of error for appeal. Unlike other aspects of the appeal, which merely require compliance with an established procedure after the trial of a cause, preservation of error must begin at the inception of a cause and is left almost entirely to the personal alertness and adroitness of counsel. Consequently, it is especially unfortunate that failure to preserve error is the most frequently recurring flaw in appeals to the supreme court.

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[397] MISS. CODE ANN. § 11-3-23 (1972).

[398] *Id.* § 75-17-7 (Supp. 1976).

[399] Koehring Co. v. Hyde Const. Co., 236 So. 2d 377, 382 (Miss. 1970).

[400] MISS. CODE ANN. § 11-3-23 (1972).

[401] McKendrick v. Lyle Cashion Co., 234 Miss. 325, 340, 106 So. 2d 509, 511 (1958).

[402] Ellis v. Merchant & Farmers Bank, 193 Miss. 557, 560, 10 So. 2d 541, 541 (1942).

[403] Shipman v. Lovelace, 215 Miss. 141, 144-46, 60 So. 2d 559, 560-61 (1952).

[404] *E.g.*, Illinois Cent. R.R. v. Nelson, 245 Miss. 395, 410, 148 So. 2d 712, 713-14 (1963).

Among the current developments affecting the appellate process, the court's extension and refinement of its rule-making power is presently drawing the most interest, or apprehension, from the bar which, like the legislature, appears to harbor its own fears of a powerful judiciary. These complaints are ironic since the supreme court is apparently attempting to modernize at least one phase of the very procedural system which has been criticized as antiquated by the bar. Notwithstanding these complaints, all indications are that the rule-making power is merely in its formative stages and that the bar can expect more "inventive judicial resourcefulness"[405] in the future. The most likely target for the court's next exercise of the power is the present "right" to oral argument before the court. Currently, time spent on the bench listening to oral arguments often totals as much as thirty-six hours per week between three justices. The unqualified right of counsel to oral argument may well be replaced by a screening and summary calendar procedure akin to that currently in force in the United States Court of Appeals for the Fifth Circuit.[406] In essence, this procedure would allow the court itself to decide which cases merit oral argument.

The bar can also expect a change in the present appeals process with the apparently inevitable creation of an intermediate court of appeals. In all probability, the existing mode of appeal will be replaced by a direct appeal to the intermediate court of appeals, with access to the supreme court governed by writ which the court could grant or deny in its discretion. Critics of this proposal contend that the system will merely shift the current supreme court caseload to the intermediate court and raise another hurdle for the bar to clear. In defense of the plan, however, it must be remembered that the supreme court is responsible for establishing precedent for Mississippi courts. To successfully perform this duty the court must be allowed to devote sufficient time to thoughtful development of solid legal precedent instead of being forced to deal perfunctorily with every case in which the loser chooses to appeal. Establishment of an intermediate court of appeals would allow the supreme court to do just that.

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[405] Isbell Enterprises, Inc. v. Citizens Cas. Co., 431 F.2d 409, 413 (5th Cir. 1970).

[406] United States Court of Appeals for the Fifth Circuit, Internal Operating Procedures Manual, § G, 17-18 (1976); *see* Isbell Enterprises, Inc. v. Citizens Cas. Co., 431 F.2d 409, 410-14 (5th Cir. 1970) (outlining the success of the screening process for its first two years in operation); Huth v. Southern Pac. Co., 417 F.2d 526, 527-30 (5th Cir. 1969) (explaining the procedure itself).

APPENDIX I

The Rules of the Supreme Court of Mississippi*

RULE 1
TRANSCRIPT—HOW PREPARED

(a) Every transcript of record brought to this Court shall be distinctly and plainly printed, or typewritten; if typewritten, paper not less than eight, nor more than eight and one-half inches wide and fourteen inches long shall be used, and only on one side of every leaf; each page shall be numbered consecutively at the bottom, at or near the center, and there shall be a blank margin at both top and bottom of not less than one inch, a blank margin at the right side of not less than one-half inch, and a blank margin at the left side of not less than one and one-half inches. Transcripts may be typewritten on linen paper, to weigh not less than eight pounds to one thousand sheets, and must be double spaced. Only black record typewriter ribbons shall be used in making up transcripts, and these must not be worn or dim. Pica type or larger should be used. All photographs, maps, and other exhibits capable of being bound in the record shall be inserted in the record at the place where first identified or introduced. The record shall not contain any brief, letter, or memorandum on legal or factual arguments made before any lower court, board, commission, or agency. When the appeal involves a case originating before any board, commission, or agency, any memorandum, letter, notice, or other document included in the record which is on paper smaller than the pages of the record shall be fastened to a blank sheet of paper of the same size required of the record and properly numbered and indexed; and all parts of the record which may be sent up from such board, commission, or agency shall be numbered and indexed as in other cases.

(b) No carbon or other duplicates, nor transcripts typewritten with copying ink, will be received, except that legible machine copies of pleadings may be used provided they meet the space, margin, and other requirements of this rule. The clerk shall preface the record with a comprehensive index of the entire record numbered seriatim. The typewritten transcript shall be securely bound in non-flexible pasteboard covers with marbled sides in volumes of about an equal number of pages, not to exceed in any case two hundred (200) pages in a volume, for the payment of which binding appellant will be allowed two dollars ($2.00) per volume to be taxed with the costs. The appellant may cause the transcript to be bound as above described, or he may, at the time of taking his appeal, deposit with the clerk of the court from which the appeal is taken a binding fee of two dollars ($2.00) per volume of two hundred (200) pages. Counsel shall not put any marking on the original record.

(c) In such cases the clerk shall transmit the unbound transcript, with the binding fee, to the Clerk of this Court. Transcripts shall not be folded, but may be rolled for transmission if not bound as required; and if not bound, the sheets shall not be fastened together.

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* SOURCE: RULES OF THE SUPREME COURT OF MISSISSIPPI (April 1, 1976). The rules contained herein include amendments through November 30, 1976. It is, of course, always advisable for counsel to contact the Clerk of the Supreme Court for all subsequent amendments to the rules before processing an appeal.

(d) The Clerk of this Court shall not accept any record made up in violation of these rules, and for the making and filing of such a record no clerk shall be allowed any fees whatever.

(e) The Clerk of this Court shall refuse to receive a record wherein the court reporter's transcript is not indexed as required by Mississippi Code Annotated Section 9-13-25 (1972). When a transcript not so indexed is tendered, the Clerk shall return the same to the clerk of the court below; and at the same time the Clerk of this Court will notify the attorneys for the appellant, by letter or letters, of his action and the reason therefor.

RULE 2
TRANSCRIPT—WHAT TO CONTAIN

A transcript shall be compiled in chronological order and shall not contain any part of the case except the pleadings, evidence, instructions, bills of exceptions and the order, judgment or decree appealed from unless the appellant shall, by writing, request other matters specified to be embraced in the transcript, a copy of which shall be annexed to the transcript; and exhibits to declarations, bills, answers, depositions, etc., shall immediately follow the particular plea or deposition first referring to them and shall be copied but once. The several answers of witnesses as made in depositions shall each follow consecutively the particular interrogatory to which they are responsive; and no commission to examine a witness, nor certificate of a commissioner to a deposition, nor any proceedings to obtain such a commission, shall be inserted in any transcript except where a question as to the sufficiency or legality thereof appears from the record to have been decided; and no fee shall be allowed for anything besides these matters required to be embraced in the transcript. The transcript shall contain only those portions of the record, proceedings, testimony, and evidence designated by counsel for appellant and appellee in accordance with Mississippi Code Annotated Section 9-13-33 (Supp. 1975).

RULE 3
AGREED TRANSCRIPT

By agreement of parties or their attorneys, made in writing and attested by the Clerk of the Court in which any case may be pending or record existing (which agreement shall be filed and made a part of the transcript of such record), such parts of the record and proceedings as shall be agreed shall constitute the transcript of the record to be brought to this Court and shall be certified as such and be considered a full transcript in this Court for the consideration and final adjudication of the cause here.

RULE 4
SUGGESTION OF DIMINUTION OF RECORD

If a record be imperfect, diminution may be suggested by either party, and a writ of certiorari will be awarded, provided that if the filing of such a suggestion has been unnecessarily delayed to the prejudice of the opposite party, the writ will be awarded only upon such terms as the Court may impose, or it may be refused altogether. When the material suggested to be included in the record is documentary, certified copies of the document(s) shall be attached to the suggestion.

RULE 5
RECORDS AND PAPERS—HOW FILED

No record or other paper shall be considered as filed until so marked by the Clerk—Process of this Court excepted—and the Clerk shall endorse the date of filing. No petition for rehearing, motion, brief, or other document, or any other copy thereof, shall be sent by an attorney directly to any individual judge. But the same shall be filed with the Clerk of the Court, to be distributed by the the Clerk as required by the rules of the Court.

RULE 6
ASSIGNMENTS OF ERROR

(a) The appellant shall file an assignment of error on or before the due date of appellant's brief, as provided infra in Rule 7, Subsection (a). The assignment of errors shall set out separately and particularly each error asserted and intended to be urged, to which shall be appended a certificate that a copy thereof has been delivered or mailed, postage prepaid, to opposing counsel. Cross-appeals may be taken without bond, by the appellee and cross-appellant by filing his cross-assignment of errors at the time the brief of appellee is due under Rule 7.

(b) No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified.

RULE 7
BRIEFS

(a) Immediately upon receipt of the record, and for the convenience of attorneys, the Clerk shall notify counsel of the filing of the record and the due date of briefs in accordance with this rule. However, failure of the Clerk to give or of a party to receive notice of the filing of the record shall not excuse any delay in filing briefs.

Appellant's brief shall be filed not later than forty (40) days after the date the record is filed in the office of the Clerk of this Court.

Appellee's brief shall be filed not later than sixty (60) days from the date the record is filed in this Court, and any rebuttal brief of appellant shall be filed not later than seventy (70) days after the record is filed herein. An original and three copies of all briefs shall be filed with the Clerk. The certificates of appeal required in criminal cases under Mississippi Code Annotated Sections 99-35-121 and 99-35-123 (1972) shall not affect the due dates of briefs in all cases, civil and criminal, which shall be as stated above.

Each case shall be considered at issue after the due date for filing of briefs has expired, and is thereafter subject to being set for oral argument and submission at any time in the discretion of the Court in accordance with Rule 9.

If the appellant fails to file his brief within the time herein required, his case shall be dismissed on motion of appellee or on the Court's motion; and any case so dismissed shall not be reinstated except as provided by Rule 18. If the appellee fails to file his brief within the time herein required, such brief shall be stricken from the record on motion of appellant or on the Court's motion. For the purpose of enforcing the foregoing, the Clerk shall advise the Court of any delinquency in filing briefs.

(b) The contents of briefs are for the determination of counsel, but those briefs are of most assistance to the Court in which there precedes the argument of counsel: First, a concise statement of the case so far as essential to an understanding of the questions presented for determination with specific references to the precise places in the abstract or abridgment of the record where the points discussed may be found; and, second, a "brief of the argument," which should consist of the points or propositions of law, or fact, to be discussed with the citation of authorities relied upon in their support.

(c) Appellant's original and rebuttal briefs together shall not exceed fifty (50) pages, and appellee's brief shall not exceed fifty (50) pages. They shall be typewritten or printed; and if typewritten, shall be in black non-copying ink, double-spaced (exclusive of quotations and footnotes), on white paper, without the name of any person or advertising matter thereon. There shall be appended thereto a certificate that a copy of it has been delivered or mailed to opposing counsel; and if mailed, the certificate to appellant's original brief must contain the further statement that it was done not later than two days before the filing thereof. Every brief shall be distinctly and plainly printed, or typewritten, and if typewritten, on paper not exceeding eight and one-half inches in width and not exceeding fourteen inches in length, on one side of every page; and each page shall be numbered at the bottom, at or near the center, and there shall be a blank margin at the top of not less than one and one-half inches and at the bottom of not less than one inch, a margin on the right side of not less than one-half inch, and a blank margin on the left side of not less than one and one-half inches. The type shall not be smaller than pica. Subject to other requirements of these rules, briefs may be reproduced also by offset printing, positive photocopy, or mimeograph process, or by any substantially similar method, provided the product is clear, easily readable, and without glare.

(d) Any brief containing language showing disrespect or contempt for the trial court will be stricken from the files, and this Court will take such further action relative thereto as it may deem proper. All briefs shall be keyed to the abstract or abridgment of the record, and all references to specific items or places where they may be found shall refer to pages of the abstract, and at the option of the briefing party may also refer to the record.

(e) If oral argument is desired by either party, he shall give notice thereof on the cover or front page of his brief by stating thereon, "Oral Argument Requested." Such request may be withdrawn by written or oral notice to the Clerk of the Court and opposing counsel.

(f) The appealing party in all direct appeals and cross-appeals shall file a brief statement not exceeding two pages, setting forth the nature and purpose of the case, the action of the trial court thereon and the points raised on appeal. The opposing party may file a similar statement. All such statements, the original and three copies thereof, shall be filed at the time of the filing of the briefs. This brief statement shall be separate from the brief and shall not be physically attached to or included in the brief. It shall contain a certificate that a copy thereof has been delivered or mailed to opposing counsel.

(g) The front cover of every brief shall show the style and number of the case and shall designate the brief as "BRIEF FOR APPELLANT," "BRIEF FOR APPELLEE," or "APPELLANT'S REBUTTAL BRIEF." Each brief shall contain a topic or subject index identifying clearly by a sentence or concise statement the separate points to be urged before the Court. The points so identified shall be numbered consecutively, and under each point shall be an alphabetical list of the cases, statutes, textbooks, and other authorities or materials which the brief maker is relying upon in support of that point, showing the page or pages of the brief where that case or other authority is mentioned. In addition to the above, there shall be a separate alphabetical table of all cases and other authorities cited in the brief with a reference to each page of the brief where the authority is mentioned. All Mississippi cases shall be cited to both the official Mississippi Reports and the Southern Reporter. Quotations from cases and authorities appearing in the text of the brief shall be followed by a reference to the book and page(s) where the quotation appears.

RULE 8

RETURN DAYS

Except as may be otherwise provided by law, the first day of each term and the first Monday of January, May, July and November shall be the return days for all appeals and all process in civil cases.

RULE 9

CALL AND ORDER OF DOCKET

(a) Except as may be provided by special order, all civil cases will be submitted in the order in which they stand on the docket.

(b) All cases, civil and criminal, where oral argument is not requested, will be submitted when they are reached on the docket, without the necessity of the cases being called and without notice to the lawyers or litigants. In cases where oral argument is requested, the Clerk of the Court shall notify the counsel of record at least ten (10) days before the date set for arguments. Oral arguments will be heard on any day of the week which meets the convenience of the Court.

(c) The minutes shall be signed and announcements of decisions shall be made on each Monday when the Court sits.

RULE 10

ARGUMENT OF COUNSEL

In the event oral argument is requested under Rule 7(e), only two counsel will be heard for each party on the argument of a case. The time allowed therefor will be determined by the Court in each case and may be apportioned between the counsel on the same side in their discretion, provided always that a fair opening of the case shall be made by the party having the opening and closing argument.

RULE 11
NO REVERSAL FOR HARMLESS ERROR

No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice.

RULE 12
NEW TRIAL AS TO PART

In case a judgment is reversed and a new trial granted, it shall be only a new trial on the question or questions with respect to which the verdict or decision is found to be wrong, if separable.

RULE 13
NEW TRIAL AS TO DAMAGES ONLY

When a judgment is reversed and a new trial ordered because the damages are excessive or inadequate, and for no other reason, such judgment shall be set aside only in respect of damages and shall stand good in all other respects.

RULE 14
PETITION FOR REHEARING

(a) Within fifteen (15) days after a decision is handed down on the merits of a case or on a motion, any party asserting that an error of law or fact was committed may file a written petition for rehearing. A petition for rehearing shall be typed or printed according to the provisions of Rule 7(c), shall be submitted with nine copies, and shall briefly and distinctly set forth its grounds. The petition for rehearing shall be accompanied by a brief in support thereof, and shall set forth that a copy of such petition for rehearing and brief have been served upon opposing counsel. A petition for rehearing and brief in support thereof together shall not exceed twenty-five (25) pages.

(b) An adjournment of Court less than fifteen (15) days after the rendition of a judgment shall not preclude the filing of a petition for rehearing therein, but the same may be filed with the Clerk within the time prescribed for presenting such petition for rehearing to the Court, whereupon all proceedings on the judgment shall be stayed until it shall be acted upon at the next session of the Court, unless a majority of the Judges of the Court shall certify in writing to the Clerk prior to the next term that they have considered the petition for rehearing and have determined to overrule it; upon receipt of such certificate such proceedings shall be had as if a petition for rehearing had not been filed.

(c) No reply to a petition for rehearing shall be filed, unless the Court shall call therefor. But no petition for rehearing will be sustained to the prejudice of the adverse party until he has been given an opportunity of replying thereto. After a petition for rehearing has been sustained, or overruled, by the Court, no further petition for rehearing shall be filed by any party.

(d) Any petition for rehearing containing language showing disrespect or contempt for this Court will be stricken from the files, and the Court will take such further action relative thereto as it may deem proper.

RULE 15
PAPERS OUT OF OFFICE

The person through whose fault a record is not in the courtroom when the case is called for submission shall be fined the sum of twenty-five dollars ($25.00).

RULE 16
MOTIONS

(a) No motion will be considered until the opposite party shall have had at least five (5) days notice if personally served with a copy of the motion and supporting brief, or six (6) full days after the date of mailing if service on the opposite party is by mail. Movant shall file with his motion a brief in support thereof, and if no supporting brief be filed, such motion may be dismissed. If respondent has any objection to such motion, he shall file an answer within the notice periods stated above and shall give his reasons in opposition to such motion in a supporting statement or brief. Any motion, answer, or brief shall have appended thereto a certificate of counsel showing the date and manner of service.

(b) No oral arguments will be heard on motions unless requested by the Court. If the Court requests oral argument, it will be heard at such time as the Court may designate, in which event the parties will be given reasonable notice.

(c) Notwithstanding the provisions of sub-paragraph (a) of this rule, the Court may summarily act upon motions with or without notice to the opposite party when (1) the motion concerns the routine administration of the Court's docket, (2) when the requested action would not deprive the opposite party of any substantial right, or (3) in cases of greatest emergency when justice requires prompt action on the motion.

(d) All motions to strike the court reporter's notes for failure to give notice to the court reporter as required by the provisions of Mississippi Code Annotated Section 9-13-33 (Supp. 1975), shall be filed not later than ten (10) days after the record in the cause is filed in this Court. The failure to file such motion within the specified time will be considered as a waiver of the defect and a motion to strike filed after the expiration of ten (10) days will not be considered by the Court.

RULE 17
CONDITIONS FOR WITHDRAWAL OF COMPLETED RECORDS FROM CLERK'S OFFICE

Records of cases completed and finally decided by this Court, or parts thereof, shall not be withdrawn from the office of the Clerk, except under the following circumstances:

(a) No one except a member of the bar in good standing, or circuit, chancery, and county court judges may withdraw from the Clerk's office any such record. Any persons entitled to withdraw such record shall post with the Clerk a cash deposit of ten dollars ($10.00), which shall be refunded upon return of such record in compliance with this rule. No such record shall be held out of the Clerk's office more than thirty (30) days. The deposit shall be forfeited at the first sitting of the Court following the failure of any person to return a record within the time limit herein prescribed, and such other action may be taken in respect thereto as the circumstances warrant.

(b) The Clerk of this Court shall keep and maintain a separate ledger book dealing solely with records and documents which have been withdrawn from the Clerk's files in accordance with this rule. He shall advise the Court in writing on the first Monday of each month of any such records, briefs, or any part thereof which have not been returned to his files in compliance with this rule. A copy of this rule shall be attached to any records or documents removed from the Clerk's office.

RULE 18
DISMISSED CAUSE—HOW REINSTATED

No cause that has been dismissed for any reason shall be reinstated unless a sworn motion is filed within fifteen (15) days of each dismissal setting forth probable error in the proceedings and good cause for reinstatement.

RULE 19
MOTION TO CORRECT JUDGMENT OR RETAX COST—STATUTORY PENALTY

All motions to retax costs or for the awarding or disallowance of five percent (5%) damages on appeal or to correct any judgment shall be filed within thirty (30) days from the date of the handing down of the opinion. There shall be appended to every such motion a certificate of counsel that he has personally read the original or a copy of the judgment in question, and that the relief sought by the motion is not already contained in the judgment; and the Clerk shall not file any such motion unless such certificate is appended. Provided, however, that when such allowance or disallowance of costs or other matter affecting the judgment has been incorporated in the opinion, the rule applicable to the filing of petitions for rehearing shall apply.

RULE 20
DOCKET—HOW CALLED

At each sitting of the Court in term the docket shall be taken up in its order.

RULE 21
FAILURE TO PROSECUTE—CAUSE DISMISSED

When any case shall be called for trial in its order, if no counsel appear or no brief be filed on behalf of the appellant, the cause shall be dismissed for want of prosecution.

RULE 22
CALCULATIONS

(a) When a party relies on an excess in the calculation of interest or damages as a reason for reversing a judgment, a true calculation shall be presented to the Court, in writing and figures, with a certificate by some counselor not interested in the cause, that the calculation is correct; and no such error will be noticed unless so presented to the Court.

(b) When a complaint is made, in a motion to retax the costs incurred in this Court, that a fee allowed based on the number of words of an instrument, or transcript thereof, or the transcript of the record as an entirety, is incorrect, the motion shall be accompanied by a written statement of the true number of such words, with a certificate of its correctness by a competent disinterested person, without which no such complaint will be considered.

RULE 23
AGREEMENT OF COUNSEL

No agreement between counsel will be regarded unless reduced to writing and signed and filed by them.

RULE 24
AUTHORITY OF COUNSEL—WHEN REQUIRED

On motion supported by affidavits, any counsel may be required to produce his authority, or show satisfactory evidence thereof, for prosecuting any appeal in this Court; and on failing to produce such authority, or furnish such evidence, the appeal may be dismissed.

RULE 25
CRIMINAL DOCKET—WHEN CALLED

Criminal cases may be set by the Court for call on any day when the Court is sitting, and in such numbers as it may designate.

RULE 26
WHEN APPELLEE MAY NOT WAIVE TIME

After a case has been called on the docket, the appellee shall not be permitted to waive the time within which citation is required to be served, nor to enter his appearance for trial of the cause at that term, except upon leave of the Court.

RULE 27
ATTORNEYS MUST BE ADMITTED TO PRACTICE

Attorneys at law who have not been admitted to practice in this Court shall not be permitted to argue orally, or file briefs or any paper in any cause in this Court.

Upon motion duly filed with this Court supported by proof that an attorney is a member in good standing of the highest court of another state and that under the rules of comity of such state, attorneys of Mississippi are similarly permitted to appear in that court, attorneys of other states may be permitted to appear in a specific case in this Court, provided the motion for such appearance has been made and granted prior to the filing of briefs in the cause. Such proof may consist of a certificate from the clerk, or a justice of the highest court of the attorney's state of residence stating when such attorney was admitted to the bar of that court and that such attorney is a member in good standing of the bar of that court, together with a copy of the pertinent rule or statute as to comity. Attorneys of other states shall not do a general practice in this Court, unless they are members of the Mississippi Bar in good standing. This rule is in implementation and not in contradiction of the statutes of this State.

RULE 28
PAPERS NOT FILED AFTER SUBMISSION

The Clerk shall not file with the papers of any cause any paper after the cause has been argued, or submitted, except by leave of the Court.

RULE 29
ORIGINAL PAPERS—WHEN CONSIDERED

Whenever it shall, in the opinion of a judge or chancellor, be necessary or proper that original papers of any kind should be inspected in the Supreme Court, such judge or chancellor may make such rule or order for safe-keeping, transporting, and return of such original papers as to him may seem proper; and such papers will be considered in connection with the transcript.

RULE 30
COSTS PAID BY APPELLANT—WHEN MANDATE RETAINED

When costs are awarded in this Court against the appellee, and there shall have been a return of nulla bona to an execution against him, and the costs shall be paid by appellant, no mandate shall issue upon the application of the appellee, until he shall pay into the Court, for the use of appellant, the costs paid by him.

RULE 31
PENALTY FOR VIOLATION OF THE RULES OF THIS COURT

Any litigant, who by himself or his counsel, fails to comply with any of the provisions of these rules, shall, on motion of the party aggrieved, be taxed with such proportion of the appeal costs as in the judgment of the Court may seem just and proper in addition to any other penalty which may be provided by the rules.

RULE 32
REMEDIAL WRITS

All petitions for remedial writs under Mississippi Code Annotated Section 9-1-19 (1972), shall be under oath by the applicant or his counsel. The petition shall state the name and office of the trial judge to whom it was first submitted, and the reasons, if any, why it was denied by him and shall have attached thereto a certified copy of the trial judge's order, if any, denying the writ.

All such petitions shall be filed with the Clerk of this Court on the miscellaneous docket and immediately delivered by the Clerk to the Court. The Court will then assign the petition to an individual judge on a rotating basis so as to equalize the number of cases between the judges as far as practical. Except in cases where extreme emergency is alleged, the judge to whom the petition is assigned shall set a date for the hearing five (5) days in advance of the setting and the attorney for the petitioner shall serve a copy of the petition on the opposite party, giving the date the matter is set for hearing. If extreme emergency is alleged, the judge to whom the petition is assigned shall decide whether to hear the matter immediately or to give notice to the opposite party. The fiat granting the writ or denying the request shall be signed by the judge acting upon such petition and a copy of such fiat shall be filed with the Clerk of this Court and the file closed, and the original of the fiat, together with the original petition shall be sent to the trial court.

RULE 33
RULES MAY BE SUSPENDED

These rules shall be considered as general rules for the government of the Court and the conducting of causes; and as their design is to facilitate business and advance justice, they may be relaxed or dispensed with by the Court in any case where it shall be manifest to the Court that a strict adherence to them will work surprise or injustice.

RULE 34
FELONY CASES WHERE APPELLANT IS ON BAIL

After the submission of a felony case in which the appellant is on bail, the Court will determine a day for rendition of its judgment. On the day so fixed, appellant shall surrender to the sheriff of the county in which he was convicted at 8:30 a.m., and the sheriff shall notify the Clerk of this Court not later than 9:00 a.m., whether the appellant has surrendered. Upon failure of the appellant to surrender to the sheriff as herein provided, this Court shall forthwith forfeit the bail bond. Bail shall not be allowed after affirmance in this Court.

RULE 35
COURT SITTINGS

(a) Beginning the first week in January, 1975, the Court will sit for the hearing of oral arguments on any day when cases are set at the convenience of the Court.

(b) In accordance with an order of the Court dated July 25, 1974, the Court will sit in divisions of three Justices. The Chief Justice shall preside over Division A; the Presiding Justice shall preside over Division B; and the Justice next in seniority shall preside over Division C. The two Justices of each division, other than the Justices who preside, shall be rotated as often as administratively practical. Substitutions may be made as circumstances may require. The divisions shall sit in sequence so that each division and each Justice shall, as far as practical, be assigned the same workload.

In the event the Justices composing any division shall differ as to the judgment to be rendered in any cause, or in the event any Justice of any division, not later than fifteen (15) days after a judgment has been entered, shall certify that in his opinion any decision already made or about to be made by any division of the Court is in conflict with any prior decision of the Court, or of any division thereof, or that the cause is of such importance that it should be considered by the full Court, the cause shall then be considered and adjudged by the full Court.

RULE 36
CRIMINAL CASES—LIST OF CASES WHERE JUDGMENT STAYED PENDING APPLICATION FOR WRIT OF CERTIORARI TO U.S. SUPREME COURT

On the first day of each term of court the Clerk shall prepare in duplicate and deliver to the Chief Justice a list of all criminal cases wherein final judgment has been stayed pending application to the Supreme Court of the United States for a writ of certiorari. The list shall show the date this Court entered final judgment, date of application for writ of certiorari, and the status of the case.

RULE 37
COUNSEL FOR INDIGENT APPELLANTS IN CRIMINAL CASES; ISSUES OF FACT ARISING OUT OF APPEALS

(a) Where an appeal is taken to the Supreme Court by a person convicted of a felony, and he is not represented by an attorney, and the existing record does not disclose whether appellant intelligently and competently waived the appointment of an attorney in this Court, the Court may request the trial court or the trial judge in vacation to determine (1) whether appellant is indigent and unable to employ counsel; (2) if indigent, whether he desires counsel to be appointed for him; and (3) if he does not desire counsel, whether he intelligently and competently waives the appointment of counsel on appeal in the Supreme Court.

A transcript shall be made by the court reporter of the hearing on these issues before the trial court or trial judge in vacation, and such transcript and the order of the trial court or trial judge shall be certified to this Court and shall be made a part of the record on appeal. If the trial judge or this Court determines that appellant is indigent and is entitled to the appointment of counsel on appeal, and that he has not intelligently and competently waived the same, the trial court or trial judge in vacation shall appoint counsel to represent appellant on his appeal in accordance with the provisions of Mississippi Code Annotated Section 99-15-15 (1972). This rule is promulgated in aid of the constitutional appellate jurisdiction of the Supreme Court and pursuant to the provisions of Mississippi Code Annotated Section 9-3-37 (1972).

(b) In the event this Court so directs, the trial court or trial judge in vacation may determine all issues of fact which may arise out of any appeal submitted to the trial court or judge for its or his determination, and which may be necessary for the disposition of cases on appeal to the Supreme Court, in accordance with the authority vested in this Court by Mississippi Code Annotated Section 9-3-37 (1972). Such hearing shall be conducted in the manner set out in subsection (a) above.

RULE 38

PROCEDURE FOR APPLICATION FOR LEAVE TO FILE PETITION FOR WRIT OF ERROR CORAM NOBIS UNDER MISSISSIPPI CODE ANNOTATED SECTION 99-35-145 (1972)

Every application for leave to file a petition for writ of error coram nobis in the lower court shall have attached thereto the original and two executed counterparts of the petition proposed to be filed in the lower court, which shall be sworn to by petitioner. Petitioner's affidavit shall designate specifically what facts, if any, alleged in the petition are within the personal knowledge of petitioner. When the petition contains allegations of fact not within the personal knowledge of petitioner, it shall have attached affidavit or affidavits of some other person or persons having knowledge of the facts which are not within the personal knowledge of petitioner. The failure to attach such affidavits of persons other than petitioner may be excused upon good cause shown. The petition shall state when the facts relied upon for issuance of the writ came to petitioner's knowledge, and shall state sufficient facts to show that there was no want of reasonable diligence on the part of petitioner or his counsel. The petition shall be endorsed by a statement by petitioner's counsel, if any, that he believes the petition for writ of error coram nobis is well taken, and should be issued. The application shall be supported by a brief, and failure to file a supporting brief may be ground for dismissal. In the event leave is granted to file the petition, the original and one executed counterpart of the petition shall be withdrawn and filed in the lower court.

RULE 39

PROCEDURE FOLLOWING ISSUANCE OF MANDATE IN CRIMINAL CASES

Except in cases involving capital punishment, within thirty (30) days after receipt by the circuit clerk of a mandate from this Court affirming a judgment or dismissing an appeal in a criminal case, the circuit clerk shall notify the Clerk of the Supreme Court in writing whether the judgment has been executed, and if so, in what manner. In any case where the judgment has not been executed the Clerk of this Court shall promptly notify in writing the Chief Justice and the Attorney General.

RULE 40

ATTORNEY'S RESPONSIBILITIES

An attorney who perfects an appeal to this Court on behalf of the appellant shall continue to prosecute the appeal by filing an assignment of errors and brief when due, unless the Court permits such attorney to withdraw from the case. If an attorney desires to withdraw from a case, he may file a motion giving his reasons for desiring to withdraw and requesting approval of this Court. Such motion shall be served upon the appellant and appellee.

When an attorney has perfected an appeal and willfully fails to file an assignment of errors and brief within the time required by the Rules of this Court, or any extension thereof, he shall be guilty of contempt and subject to punishment by (1) censure, (2) fine, or (3) suspension from practice in this Court, depending upon the degree of neglect as determined by this Court.

Before the imposition of any such punishment, the attorney affected thereby shall be entitled to a hearing at such time, place and under such circumstances as the Court may direct.

RULE 41

ABSTRACT OR ABRIDGMENT OF RECORD REQUIRED

(a) In all cases, the appellant shall make and file with his brief an abstract or abridgment of the record which shall consist of an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary for a clear understanding of all questions presented to this Court for decision. The abstract shall contain references to the pages of the record. When testimony is abstracted, the first person shall be used. Whenever a map, plat, photograph, or other exhibit must be examined for an understanding of the testimony, the appellant should reproduce such exhibit by photography or other process when practical to do so and insert it at the appropriate place in the abstract. Appellant's failure to file an abstract or abridgment of the record shall be cause for dismissal of the appeal.

(b) If the appellee considers appellant's abstract to be defective or insufficient he may, at his option, submit with his brief a supplemental abstract which shall be prepared generally as set out in Paragraph (a) insofar as is practical, and shall point out wherein appellant's abstract is defective or insufficient, with appropriate references to pages in the record. Appellee's supplemental abstract shall not repeat those parts of appellant's abstract not claimed to be defective or insufficient.

(c) The abstract, and any supplemental abstract, may be included in the brief of the party filing it, and this section shall not contain any argument or editorializing. Any argument on the facts shall be contained in other parts of the brief. The pages containing appellant's abstract of the record and appellee's supplemental abstract shall not be counted for purposes of the fifty-page limitation on the length of briefs.

(d) This rule shall apply to all cases in which the record is filed after February 1, 1976.

RULE 42
INSTRUCTIONS

The judges of the circuit courts of Mississippi have adopted uniform rules of procedure for the circuit courts, and among those rules adopted is Rule 14 requiring attorneys to file jury instructions with the circuit clerk and to deliver copies of the instructions proposed to be given the jury to opposing counsel before the trial. The rule further provides that attorneys are required to dictate their specific objections to an instruction offered, thus giving the trial judge an opportunity to pass upon the objections before the case is argued before the jury.

After considering the foregoing rule, we are convinced that it will aid in promoting better judicial procedure and should be implemented by this Court. It is, therefore, the rule of this Court that no assignment of error based on the giving of an instruction to the jury will be considered on appeal unless specific objection was made to the instruction in the trial court stating the particular ground or grounds for such objection. However, in extreme cases this Court may raise an objection to a jury instruction in order to prevent manifest injustice.

RULE 43
WRITTEN OPINIONS

(a) **Written Opinions.** In all cases where the judgment or decree of the trial court is affirmed, no opinion will be written unless a majority of the Justices deciding the case determine that a written opinion will add to the value of the jurisprudence of this State.

(b) **Standards for Publication.** An opinion of the Supreme Court shall not be designated for publication unless:

(1) The opinion establishes a new rule of law or alters or modifies an existing rule; or

(2) The opinion involves a legal issue of continuing public interest; or

(3) The opinion criticizes existing law; or

(4) The opinion resolves an apparent conflict of authority; or

(5) The opinion will serve as a useful reference, such as one reviewing case law or legislative history.

(c) **Application of Standards.** Opinions of the Court shall be published only if a majority of the Justices participating in the decision find that a standard for publication as set out in section (b) of this rule is satisfied. However, if a majority of the full Court finds that a standard for publication as set out in section (b) of this rule is not satisfied, the opinion shall not be published.

(d) **Consideration at Conference.** The Court will consider the question of whether to publish an opinion at its decision-making conference and will at that time, if appropriate, make a tentative decision not to publish.

(e) **Unpublished Opinions—Designation—Not to be Cited—Filing Listing in Reports.** All opinions that are not found to satisfy a standard for publication as set out in section (b) of this Rule shall be marked, "Not Designated for Publication." Opinions marked "Not Designated for Publication" shall not be cited, quoted, or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as res judicata, collateral estoppel, or law of the case). Opinions marked "Not Designated for Publication" shall be filed in the Clerk's office as public records and shall be listed in the Southern Reporter by case number, style, date, and disposition.

(f) **Copies of all Opinions Available.** In every case one copy of the Court's published or unpublished opinions will be furnished to the trial judge and to counsel for every party on whose behalf a separate brief was filed.

RULE 44

EXTENSION OF TIME FOR COURT REPORTERS TO TRANSCRIBE NOTES

If a court reporter finds that he will not be able to complete his transcript of the notes in any case within the time prescribed by Mississippi Code Annotated Section 9-13-25 (1972), and within a 30 day extension granted in accordance with Mississippi Code Annotated Section 9-13-37 (1972), the court reporter may apply to the Supreme Court for an extension of time. No application will be considered unless accompanied by a certificate of the judge or chancellor who presided at the trial, setting forth in detail the facts necessitating the requested extension of time. For cause shown, the Supreme Court may grant such extension as it deems necessary consistent with justice.

RULE 45

APPEARANCE BOND PENDING UNITED STATES SUPREME COURT ACTION

Motions and petitions filed with this Court for release on appearance bond pending petition to the United States Supreme Court for certiorari seeking review of a decision of this Court affirming a criminal conviction will be considered only when accompanied by the following documents: (1) a duplicate copy of the petition for certiorari previously filed with that Court showing a genuine federal question previously presented to this Court; (2) a certificate of the attorney for the applicant that the original of the petition for certiorari has been filed with the Clerk of that Court; and (3) a fully executed and approved appearance bond in a penal sum equal to double the amount of the bond upon which the applicant was released from custody between the time of conviction and the time the conviction was affirmed.

APPENDIX II

1976 STATISTICAL INFORMATION

TOTAL NUMBER OF WRITTEN OPINIONS[1]

Court Year Ending	Majority Opinions	Concurring & Dissenting Opinions	Total Written Opinions on the Merits	Motions	Petitions[2]	Total
1970	326	10	336	7	6	349
1971	326	11	337	12	10	359
1972	303	13	316	4	3	323
1973	242	10	252	8	11	271
1974	303	25	328	7	1	336
1975	289	17	306	14	0	320
1976	327	29	356	6	7	369

[1] SOURCE: SUP. CT. OF MISS. ANN. STATISTICAL REP. 12 (1976).

[2] Includes petitions for rehearing.

APPENDIX II (*continued*)

CASES ON THE MERITS—TYPE OF CASE[3]

Court Year Ending	Contract	Criminal (Felony)	Criminal (Non-Felony)	Domestic Relations	Eminent Domain	Insurance	Personal Injuries	Property Damage	Real Property	Workmen's Comp.	Wills, Trusts & Estates	Others[4]	Total
1970	22	82	15	23	9	23	67	8	23	27	20	80	399
1971	20	103	9	20	14	18	46	6	32	26	11	87	392
1972	35	95	12	17	11	19	59	10	33	16	10	78	395
1973	19	143	10	32	13	25	42	6	22	10	18	57	397
1974	30	169	9	29	15	16	34	11	28	24	18	83	466
1975	28	160	7	37	22	16	40	12	30	20	11	97	480
1976	41	150	13	36	13	20	46	7	38	17	15	95	491

[3] SOURCE: SUP. CT. OF MISS. ANNUAL STATISTICAL REP. 14 (1976).

[4] Includes: torts other than personal injury and property damage; cases originating in municipal, county, and state boards and agencies; cases involving zoning, injunctions, *coram nobis*, taxation, liens, contempt, small loan act, negotiable instruments, bonds, election contests, and replevin; and miscellaneous cases.

APPENDIX II (*continued*)

CASES ON THE MERITS—NATURE OF DISPOSITION[5]

Court Year Ending	Affirmed	Reversed	Affirmed in Part Reversed in Part	Affirmed on Condition of Remittitur or Additur	Total Dispositions	Total No. Reversed
1970	286	97	13	3	399	113
1971	266	112	13	1	392	126
1972	265	101	26	3	395	130
1973	284	88	22	3	397	113
1974	301	134	27	4	466	165
1975	343	111	18	8	480	137
1976	325	141	20	5	491	166

[5] SOURCE: SUP. CT. OF MISS. ANN. STATISTICAL REP. 17 (1976).

APPENDIX II (*continued*)

CASES ON THE MERITS—REASON FOR REVERSAL[6]

Court Year Ending	Over-whelming Weight of Evidence	Instruction	Peremptory[7] Instruction	Wrongful Exclusion or Admission of Evidence	Procedure	Damages[8]	Law	Lack of Substantial Evidence	Total
1970	24	16	0	0	9	6	50	2	113
1971	33	10	0	8	12	2	55	6	126
1972	18	12	8	11	12	5	62	2	130
1973	23	7	7	7	8	5	53	3	113
1974	24	13	11	10	30	10	60	7	165
1975	17	6	4	12	14	15	65	4	137
1976	31	3	4	6	23	5	91	3	166

[6] SOURCE: SUP. CT. OF MISS. ANN. STATISTICAL REP. 19 (1976).

[7] Prior to 1972, errors in granting or refusing peremptory instructions were classified variously as errors in instructions or errors in law.

[8] Includes cases which were affirmed on condition of additur or remittitur.

VALUES, EDUCATION AND THE LAW

*George Z. F. Bereday**

The natural question for a lawyer confronted with the title of this article will surely be "What are values?" However, for those individuals who have had the opportunity to be trained both in the law and in educational sociology, formulating a precise definition of "values" as that term relates to education is a needless task—everything done in the schools teaches values. Indeed, even those educators who advocate a so-called "value neutral" school implicitly propose that the schools teach the value of neutrality. Thus, the more appropriate question is not what values are, but which values are required to be taught in the schools and which values are prohibited from formal instruction.

Outside of the law, there has been lengthy sociological and pedagogical discussion over not only which values should be taught and how their effective communication may be achieved, but also, with even greater difficulty, the means by which a choice is to be made between those values which are worth teaching and those which are not.[1] This discussion is particularly important to the legal profession since education recently has been confronted with a scale of values on which some are mandated and some are prohibited by law.[2] Although in some areas, *e.g.*, encouraging obedience to criminal law prohibitions,[3] value trans-

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[1] *See, e.g.*, CONFLICT AND CHANGE IN EDUCATION (Ianni ed. 1975); J. CHILDS, EDUCATION AND MORALS (1950); R. CORWIN, EDUCATION IN CRISIS (1974); H. FULL, CONTROVERSY IN AMERICAN EDUCATION (2d ed. 1972); MORAL EDUCATION (1970); W. O'NEIL, SELECTED EDUCATIONAL HERESIES (1969); J. RICH, EDUCATION AND HUMAN VALUES (1968); N. MCCLUSKEY, PUBLIC SCHOOLS AND MORAL EDUCATION (1958).

[2] One example of the values prohibited by law is the ban against a state's interference with denominational faith by teaching religion in state schools.

> When, as in England, the various parties concerned can agree on a syllabus of religious instruction, dealing with the Christian beliefs common to them all, this is followed in the public schools—or at least considered for adoption. In the U.S.A., however, this point is not conceded—and this for many reasons, chief of which is a widespread fear of Roman Catholic influence. Yet, even there the situation is changing quite rapidly. Some educationists are now inclined to predict that, while the public schools will continue to be secular, ways will be found within the next few years of allocating public funds to denominational schools and colleges.

CHURCH AND STATE IN EDUCATION 13 (G. Bereday & J. Lauwerys ed. 1966) [hereinafter cited as CHURCH AND STATE].

[3] "[S]chool boards are empowered to adopt reasonable rules covering any conduct which could be proved to a court to be detrimental to the good order and proper operation of the schools." R. HAMILTON & E. REUTTER, LEGAL ASPECTS OF SCHOOL BOARD OPERATION 22 (1958). Examples of conduct which fall into this category are the criminal law prohibitions against theft, assault, truancy or vandalism.

mission raises no significant legal problems, other areas which call for greater public and judicial involvement in school administration have created grey areas which must be resolved.

The purpose of this article is to explore the various theories concerning values teaching and to examine the legal response to the myriad conflicts involved. The subject is one which must be squarely faced by all participants in the educational process, including the legal profession, if any meaningful resolution is ever to be achieved. We cannot escape the fact that all schools indoctrinate their pupils, even though some, such as American schools, have traditionally attempted to indoctrinate against indoctrination.

I. SOCIOLOGICAL AND PEDAGOGICAL BACKGROUND

In American schools, moral education has always been more implicit than explicit. Americans would find abhorrent the Japanese method of overt moral teaching which employs an eighty-point checklist on how to be an ideal citizen.[4] The Japanese, in turn, are astonished that Americans treat the all-important subject of morals in an undefined and seemingly haphazard fashion.[5] American schools refrain from teaching such a guide as the Boy Scout Code, let alone the "Twenty Rules for Pupils" by which a good Soviet citizen is shaped.[6] Nor is there a clear national ideal like the English gentleman toward which the schools may seek to upgrade all pupils. Yet, an American parent tells his or her child to "be good" rather than "*sois sage*" (be wise), by which the French admonish their offspring.[7] The general atmosphere of American schools has been consistently moral rather than intellectual. Unlike Soviet schools which emphasize science or English schools which show a preference for humanities, American schools are noted for the social sciences—presumably not only for their ability to satisfy intellectual curiosity, but also for their utilitarian value in fostering morality.[8] In all schools, students are exhorted to "be themselves," and at the same time to "get along," a compound of individualistic and social morality. By gentle persuasion, and on occasion by overt pressure, the schools enforce conventional personal behavior, civic virtues, parental moral codes and their own professional ethos. In addition, public calls for the schools to teach respect for the law, consciousness of poverty and the virtues of free enterprise are routinely heard in times of youth disturbances or lawlessness. We are now facing such a time in education. "If moral education has always been prominent in the educational consciousness," writes Marvin Bressler, "its linear descendent, 'values education,' has become of late something of an industry."[9]

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[4] The Japanese are foremost among nations in specifying in formal detail what they expect from moral education in the school setting even though Japan's unprecented historical continuity and the resulting similarity of customs among its people would seem to make such insistence superfluous. The teaching of moral education (*shushin*) was abolished by American occupation forces because filial piety and the obedience it ordained made the nation especially susceptible to military dictatorship. Once independent, however, the Japanese restored the formal requirement of moral education in the schools, although with a different name (*dotoku*) and without the former emphasis on patriotism and nationalistic pride. The new guide specifies over 80 items necessary to be an ideal Japanese. *See generally* R. HALL, SHUSHIN: THE ETHIC OF A DEFEATED NATION (1949); Duke, *The New Guide for Teaching Moral Education in Japan,* 8 COMP. EDUC. REV. 186 (1964).

[5] Reciprocal Japanese and American interests in respective moral educational teachings in homes and schools are described in detail in G. BEREDAY & S. MASUI, AMERICAN EDUCATION THROUGH JAPANESE EYES 34-40 (1973).

[6] Moral education in Soviet schools is described in detail in THE CHANGING SOVIET SCHOOL (G. Bereday, W. Brickman & G. Read ed. 1960).

[7] For an excellent short summary of French concepts of moral education in the home and the school, see R. METRAUX & M. MEAD, THEMES IN FRENCH CULTURE (Hoover Institute Studies, Series D: Communities, No. 1, 1954).

While American schools enforce values more or less informally, theoreticians of education express quite structured concerns.[10] These concerns, like many legal matters, can be subdivided into procedural (pedagogical) areas and substantive (social science) areas. Since the turn of the century when Oxford's Sir Michael Sadler exhorted comparative educators to concern themselves with the "intangible, impalpable forces behind the pedagogical scene,"[11] professional educators have shared with social scientists an interest in the sociological substance of education. Their exclusive concerns, however, have been directed toward procedural matters.

A. *Procedural Concerns: How Are Values Most Effectively Taught?*

From a methodological standpoint, values are best taught by example. Concerned with the attrition that follows the over-propogandizing of values in a normative curriculum, educators often attempt to maintain a high value component of empirical and analytical studies. In so doing, however, the results of such studies tend toward emphasis on the average rather than the individual. Indeed, great value is placed on statistics and logical consistency for credibility.

The conflict between individual aspirations and social duties finds reconciliation in such pedagogical maxims as "you owe it to yourself and others to develop your talent to the full." It may be said that Stalin's cynicism "One death is tragedy, a million deaths, a statistic" is reversed in the schools. The pedagogical maxim is to aim at average values for millions because such an irreducible minimum enforced upon each individual student overrides that student's personal right to be free from indoctrination.

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[8] *See generally* G. Bereday, Comparative Method in Education 163 (1964).

[9] Bressler, *Kohlberg and the Resolution of Moral Conflict,* N.Y.U. Educ. Q., Winter 1976 at 2.

[10] These concerns were first expressed in Commission on the Reorganization of Secondary Education, Cardinal Principles of Secondary Education (1914) and have continued to the present. *See, e.g.,* Public Education in America 32-33 (G. Bereday & L. Volpiceli eds. 1958).

[11] Bereday, *Sir Michael Sadler's Study of Foreign Systems of Education,* 7 Comp. Educ. Rev. 307, 309 (1964).

A special example of pedagogical concerns is the confrontation between concepts of exposure and concepts of effectiveness. Traditional schools of moral education, confident that such exposure would automatically ensure effectiveness, required mere exposure. Current thinking has tested this proposition by seeking empirical confirmation. The difference between the two approaches can be illustrated in civic education by contrasting the findings of Merriam's *The Making of Citizens*[12] with those of Almond and Vera's *The Civic Culture.*[13] In a pioneering summary of eight national studies he commissioned in the Thirties, Merriam simply catalogued the devices used in the schools to ensure good civic behavior. His conclusion was that such elements as the presence of uniforms, marching with school bands, political lectures or saluting the flag were a convincing index of patriotic teaching.[14] For Almond and Verba, however, the success of teaching civic behavior was to be tested not by what happened in the schools, but by what took place in the polling booth, before the draft board or in the service of political parties.[15] Moreover, they found that political participation increases with years of education received[16] and that the same correlation obtains between years of schooling and political and racial tolerance.[17] No convincing evidence has been found, however, to show that length of exposure in terms of class hours successfully teaches more moral behavior. Indeed, one study found that American schools spend more time teaching civic duties than Soviet schools.[18] Yet, this finding does not lead to the inevitable conclusion that the result is more civic-minded people in one country than the other.

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[12] The most recent edition of the book is C. MERRIAM, THE MAKING OF CITIZENS (G. Bereday ed. 1966) [hereinafter cited as THE MAKING OF CITIZENS]. Merriam's original study was followed by C. MERRIAM, CIVIC EDUCATION IN THE UNITED STATES (1934). These studies were the culmination of numerous previously published national studies. *E.g.*, R. BROOKS, CIVIC TRAINING IN SWITZERLAND: A STUDY OF DEMOCRATIC LIFE (1930); S. HARPER, SOVIET RUSSIA (1929); C. HAYES, FRANCE: A NATION OF PATRIOTS (1930); P. KOSOK, MODERN GERMANY: A STUDY OF CONFLICTING LOYALTIES (1933); B. PIERCE, CIVIC ATTITUDES IN AMERICAN SCHOOL TEXTBOOKS (1930); H. SCHNEIDER & S. CLOUGH, MAKING FASCISTS (1929); E. WEKER, THE DUK-DUKS: PRIMITIVE AND HISTORIC TYPES OF CITIZENSHIP (1929).

[13] G. ALMOND & S. VERBA, THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS (1963). The study summarizes as follows the results of 5,000 interviews taken in 1959 and 1960 in the United States, Great Britain, Germany, Italy, and Mexico. "Educational attainment seems to be the most significant demographic variable in our study, and the one most able to explain differences among nations." *Id.* at 67.

[14] THE MAKING OF CITIZENS, *supra* note 12, at 184-200.

[15] G. ALMOND & S. VERBA, *supra* note 13, at 382. *See also* THE MAKING OF CITIZENS, *supra* note 12, at 430.

[16] G. ALMOND & S. VERBA, *supra* note 13, at 380. *See also* THE MAKING OF CITIZENS, *supra* note 12, at 432.

[17] Conclusions similar to those of Almond and Verba were reached for the relation of the level of education to tolerance of left-wing views in S. STOUFFER, COMMUNISM, CONFORMITY AND CIVIL LIBERTIES: A CROSS-SECTION OF THE NATION SPEAKS ITS MIND (1955) and to tolerance of desegration in M. TUMIN, DESEGREGATION: RESISTANCE AND READINESS (1958).

Effectiveness of value teaching is also obliquely at issue in the controversy over whether the schools bring about conditions of greater social equality. Educating all children under a common roof has long been the central tenet of the egalitarian schools of which the United States continues to be the foremost pioneer. Critics have pointed out not only that the common classroom slows down the educational progress of the very talented, but also that no matter what the equipment and techniques employed, the schools can do little to reduce the inequalities which children bring into them.[19] Egalitarians do not seem able to implement the call issued in the Thirties by George Counts that schools should teach their pupils to improve society rather than to adjust conservatively to the existing one.[20] In terms of methodology, however, the egalitarians stand on more convincing ground when they point to the preventive effect of teaching egalitarian values. "School is like a policeman," Robert Ulich was fond of saying, "[h]e is standing at the corner seemingly doing nothing, but where would we be without him?"[21] Although the teaching of equality may or may not increase actual equality, few doubt that inequality would increase if it were left alone. Consequently, the teaching of equality is claimed to be the antidote that keeps inequality in check.[22]

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[18] Bereday & Stretch, *Political Education in the U.S.A. and U.S.S.R.*, 7 COMP. EDUC REV. 9 (1973), *reprinted in* THE MAKING OF CITIZENS *supra* note 12, at 416 *and* EDUCATION IN COMPARATIVE AND INTERNATIONAL PERSPECTIVES 360 (K. Gezi ed. 1971).

[19] "It appears that variations in the facilities and curriculums of the schools account for relatively little variation in pupil achievement insofar as this is measured by standard tests." J. COLEMAN & E. CAMPBELL, EQUALITY OF EDUCATIONAL OPPORTUNITY 22 (1966). The Coleman and Campbell study and C. JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING (1972), best represent a large and persuasive literature on the impotence of education in alleviating inequality. For further analysis of these reports, see D. LEVINE & M. BANE, THE INEQUALITY CONTROVERSY: SCHOOLING AND DISTRIBUTIVE JUSTICE (1975); F. MOSTELLER & D. MOYNIHAN, ON EQUALITY OF EDUCATIONAL OPPORTUNITY (1972).

Although these findings have been generalized by the public into a belief that the school is impotent in all areas, primarily to provide an excuse to limit school funds, they are directly applicable only to short term effects. A marginal addition of further funds in an already highly financed system apparently has no egalitarian effect upon school attainment. In poor schools, where some students are healthy and some are not, some have books and some do not, providing better health care for the ailing and books for the poor will improve the educational chances of these categories of students. Although improved educational facilities for poorer students may not immediately improve their school successes, their achievements show up as positive through the encouragement to study and greater motivation their children and grandchildren may receive.

The entire debate, however, has little relevance to value teaching. Moral egalitarianism in the schools, though not costly, is nonetheless controversial for theoretical reasons. An egalitarian panacea is difficult to define and impossible to maintain. It tends to deny freedom, discourages competitive effort and often leads to the rise of an inegalitarian guardian class. On the other hand, the rise of political and social sophistication of the masses makes inequality, even when based on merit, objectionable to a large number of people. Teaching egalitarian ethos satisfies psychic demands and may inhibit even greater inequality or at least make it easier to bear. In this view, the schools must be conceived to be not the agents of equality but of equalization. *See* Bereday, *Selective Education Versus Education for All*, 58 TCHRS. C. REC. 198, 200-06 (1957), *reprinted in* LIBERAL AND CONSERVATIVE: ISSUES FOR COLLEGE STUDENTS 175 (E. Garber & J. Crosset eds. 1968).

[20] G. COUNTS, DARE THE SCHOOL BUILD A NEW SOCIAL ORDER? (2d ed. 1969). The book

A special issue in matters of effectiveness is whether the very act of routine teaching deprives values of their meanings. The classic concern was formulated by Alfred Whitehead[23] who pointed out that when great values are first pronounced by great prophets they have a shimmering glow and freshness of their own. However, when such values are repeated a thousand times by a thousand mouths, they shrivel up and die at our feet. Whitehead's warnings against "inert ideas"[24] have been echoed by subsequent generations of educators, and the existence of these ideas is one of the most significant pedagogical problems in value education.

B. *Substantive Concerns: What Values Are To Be Taught?*

In examining substantive concerns, pedagogues join social scientists in searching for a formula to resolve value conflicts. Major areas of concern include disputes over the correct apportionment of teaching self-oriented values rather than those values which stress service to others, whether the schools should be heaven oriented or earth oriented, *i.e.* perennial or temporal in setting their goals, and whether idealism is to prevail over pragmatism and existentialism. The boundaries between these values are essentially degrees of commitment: Should values be taught with passion (idealism), with caution (pragmatism) or with doubt as to their true worth (existentialism)? Furthermore, how should the schools take account of the disparity between values as they are taught and their betrayal by society and, in some cases, by the schools themselves? The insulation of school values from life outside of the classroom, implicit in school teaching, remains a seemingly insurmountable problem. Above all, the question of whether the schools should be tough or permissive in matters of discipline presents tremendous fuel for conflicts in the schools.[25]

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is a classic, urging teachers to use moral training in the school as a tool of social reform.

[21] A statement oft-repeated in lectures at Harvard University's Graduate School of Education by Dr. Robert Ulich, James Bryant Conant Professor of Education.

[22] See note 19 *supra.*

[23] A. WHITEHEAD, THE AIMS OF EDUCATION & OTHER ESSAYS 1-23 (1929).

[24] *Id.* at 1-2.

[25] It is a puzzling thought that the Buddhist and Christian monasteries which made austere demands on all senses and insisted on severe deprivations have been, by historical

Conflict resolution concerns itself with assigning the proper priorities to the values to be taught. Of special interest in this category is the critical literature which claims that schools act as the agent of an establishment intent upon brainwashing masses of pupils into acceptance and subservience to the ruling elite. Paulo Freire's *Pedagogy of the Oppressed*[26] and Ivan Illich's *Deschooling Society*[27] best represent this genre.[28] Freire urges that, as an antidote to the high or guided culture dispensed by the elite, the schools should teach a grassroots culture in which pupils are consulted and are permitted to coregulate their own instruction.[29] Illich goes far beyond these points and would dismantle the schooling apparatus to permit grassroot pedagogy to come from free learning centers in which pupils and their parents foster educational growth unhampered by school bureaucracy.[30] The concept of the state school as a villainous agent of a capitalist or socialist conspiracy is not new.[31] What is new is that the ideal of enforced education for all is now viewed by some as a means of enslavement rather than liberation of the masses.

A less combatant proposal for teaching conflicting values is Kohlberg's construction of a hierarchy of merit within which values are catalogued according to priority of importance.[32] Kohlberg's preconventional, conventional and postconventional stages of moral growth are further subdivided to make an ascending six-point scale.[33] The scheme,

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account, most successful as schools. *See, e.g.,* W. BOYD, THE HISTORY OF WESTERN EDUCATION 101-07 (1965); M. GILLETT, A HISTORY OF EDUCATION 61-62 (1966); H. GOOD, A HISTORY OF WESTERN EDUCATION 69-73 (1960); A. MEYER, AN EDUCATIONAL HISTORY OF THE WESTERN WORLD 74-78 (1965); E. MEYERS, EDUCATION IN THE PERSPECTIVE OF HISTORY 51, 121, 222 (1960); E. REISCHAUER & J. FAIRBANK, EAST ASIA: THE GREAT TRADITION (1958). The record is incomplete, however, and does not show the psychic unhappiness which the struggle for spiritual peace entails.

[26] P. FREIRE, PEDAGOGY OF THE OPPRESSED (1970).

[27] I. ILLICH, DESCHOOLING SOCIETY (1971).

[28] Other works in this vein include S. BOWLES & H. GINTES, SCHOOLING IN CAPITALIST AMERICA (1976); M. CARNOY, EDUCATION AS CULTURAL IMPERIALISM (1974); C. GREER, THE GREAT SCHOOL LEGEND (1972); M. KATZ, CLASS, BUREAUCRACY AND SCHOOLS (1971).

[29] P. FREIRE, *supra* note 26, at 58-59.

[30] I. ILLICH, *supra* note 27, at ix-xx.

[31] *See, e.g.,* G. COUNTS, *supra* note 20; N. LODGE, THE COUNTRY OF THE BLIND (1949).

[32] Kohlberg, *The Child as a Moral Philosopher,* in MORAL EDUCATION 131 (B. Chazan & J. Soltis eds. 1974).

[33] At stage one the individual defers to authority out of fear of punishment. Good or bad consists of avoiding or succumbing to that punishment. At stage two he progresses to behavior calculated to get what he wants. Moral action toward others is the exchange of gratifications. At stage three good behavior is what pleases others. The individual strives for approval by being "nice." At stage four rules appear for the sake of themselves. Good is to do his duty and to maintain the social order. At stage five the rules acquire the force of law. He obeys them not so much for their intrinsic values as because they have been arrived at by social censensus. The individual reaches the sixth and the supreme stage when he acts according to "self-chosen ethical principles appealing to logical comprehen-

however, has been criticized for representing a hierarchy of values consistent only with upper class concepts of liberality.[34] Having tested the scheme in Great Britain, Canada, Taiwan, Mexico and Turkey,[35] Kohlberg has rebutted some of this criticism with the claim that the hierarchy has universal application not only for all social classes but for all cultures. At the very least, the scheme represents an attempt to reconcile conflicting values by introducing a "value scale for values."[36]

II. LEGAL SOURCES OF AUTHORITY TO TEACH VALUES AND THE STUDENTS' RIGHT TO LEARN

The courts consistently have upheld the notion that the obligation to provide education must include training in moral qualities.[37] Legal enforcement of value education has meaning for two constituencies—the adults who desire that values be taught to minors and the minors who are constrained and benefited by being taught proper moral behavior.[38]

The teaching adults appear in two roles—as parents and as the state.[39] The actual scenario representing adult power to enforce values can be conceived in five points of entry. First stand the parents whose traditional common law right to teach their children values is still the most formidable source of authority, especially in laissez-faire countries.[40] When parents are compelled or voluntarily assign these rights,

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siveness, universality and consistency." *Id.* at 134. Laws are replaced by "universal principles of *justice*, of the *reciprocity* and *equality* of human rights and of respect for the dignity of human beings as *individual persons*." *Id.*

[34] *See* Bressler, *supra* note 9, at 6-8.

[35] Kohlberg, *supra* note 32, at 131, 139-42.

[36] Lawyers will be interested to note that the society they strive to uphold is one which, according to Kohlberg, has reached only stage five in his scheme of moral development. *Id.* at 133-34.

[37] *E.g.*, Hooker v. Parking, 235 Ark. 218, 224, 357 S.W.2d 534, 540 (1960) (education "[c]omprehends not merely the instruction received at school or college, but the whole course of training, moral, intellectual, and physical"); Kaplan v. School Dist. of Philadelphia, 178 Pa. Super. Ct. 88, 90, 113 A.2d 164, 166 (1955) ("The term 'education' includes cultivation of morality as well as attainment of knowledge and intellectual culture.").

[38] For a brief recent overview of the conflict between adult-parental rights and childrens' rights, see Carter, *Children and Student Rights*, 11 URB. EDUC. 185 (1976).

[39] A third category—sectional interests represented by church and private schools—may be subsumed into one of the other two. They are either agents of the parents whose free decision entrusts their children to them or a subsection of state schools by virture of integrating state regulations.

[40] During the nineteenth century there was a spate of legislation relating to children but none of it challenged the idea so firmly held in common law that children were the possessions of parents. None of it contained even a hint of giving status to the child as a person. The child was the property of its parents who had complete control over its being and life and the new laws buttressed this idea.

P. ADAMS, L. BERG, N. BERGER, M. DUANE, A. NEILL & R. OLLENDORFF, CHILDREN'S RIGHTS state servants such as schoolteachers enter the picture. As the parents' agents, they address themselves to the moral training of the children in loco parentis.[41] The schools then shift their allegiance from the parents to the state which may claim its right as parens patriae[42] when it can

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154 (1971) [hereinafter cited as CHILDREN'S RIGHTS] This position has changed little to date.

[41] The in loco parentis doctrine considers the authority of the schools to be derived from the power of the parents over the children. This power is well established in the law. From the many judicial statements available, Wisconsin v. Yoder, 406 U.S. 205, 232 (1972), is perhaps best representative of the courts' approaches:

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

The schools claim this power by delegation when teachers take over the responsibility for the children. "The concept of the teacher standing in place of the parent (in loco parentis) is well established . . . ." R. HAMILTON & E. REUTTER, *supra* note 3, at 25.

While it is possible to interpret all handling of children by the school as authorized by the in loco parentis doctrine, it has traditionally been used with special reference to punishment. The teacher has been held to assume the parents' role in disciplinary problems, especially those dealing with corporal punishment. "If corporal punishment administered by a parent is not unconstitutional, then a reasonable utilization of that same form of chastisement by a properly delegated person is not prohibited." Glaser v. Marietta, 351 F. Supp. 555, 558 (W.D. Pa. 1972). In addition to punishment, issues such as dress codes, teenage marriages, general school discipline, *see generally* R. STRAHAN, THE COURTS AND THE SCHOOLS (1973), or the tort liability of teachers or parents, R. HAMILTON & E. RUETTER, *supra* note 3 at 284-90, have been treated within the scope of the doctrine. With reference to value teaching, the use of the concept would limit the rights of the school to teaching only those values that would be approved by the parents. The doctrine validly upholds the neutrality of the school in religion or politics and limits the right of the schools to present subjects such as sex education. See notes 183 through 186 and accompanying text *infra.* When national interest of a wider utility is involved, however, the tendency has been to override the wishes of parents in favor of the state. Accordingly, the in loco parentis doctrine has been limited in matters of punishment. *See* Ware v. Estes, 328 F. Supp. 657, 658-60 (N.D. Tex. 1971), *aff'd per curiam,* 458 F. 2d 1360 (5th Cir.), *cert. denied,* 409 U.S. 1027 (1972). *See also* Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.), *aff'd,* 423 U.S. 907 (1975). The doctrine has been resisted especially by ethnic groups who view it as a vehicle for invasion of their rights by a middle class school bureaucracy. R. STRAHAN, *supra,* at 20.

[42] The parens patriae doctrine embodies the state's sovereign power of guardianship over disabled persons. BLACK'S LAW DICTIONARY 1269 (4th ed. 1957). In the family law context, the doctrine applies to disabilities suffered by abused or abandoned children or by children who are without proper supervision by a parent or guardian.

> It is an assertion upon the part of the state of its right to exercise its power as parens patriae for the welfare of such of its minor citizens as are deprived of proper parental control and oversight and are disposed to go wrong.

In re Turner, 94 Kan. 115, 121, 145 P. 871, 872 (1915). As applied to education, the doctrine has mandated the state's affirmative duty to act when the parents are "fostering 'ignorance' from which the child must be protected by the State," Wisconsin v. Yoder, 406 U.S. 205, 222 (1972). The doctrine was fashioned by the courts to be expressly applicable only in the case of parental wrongdoing "to 'save' a child from himself or his . . . parents." *Id.* at 232. The states have asserted their rights under the doctrine where child demonstrate that the parents have failed to function in the best interest of children. In the fourth situation, the state may claim its own compelling interest and use its "police power" to regulate the interest of each child when that individual interest is outweighed by the interest of all other citizens. The sequence could culminate in a fifth situation in which the state's duty to provide education and the students' right to receive education, including its moral components, would be declared not merely a substantial right but a fundamental constitutional right. In this posture, education would be an inalienable feature to be judicially enforced and protected from parental or state abuse unless interference is unquestionably justified by a compelling state interest. The state's police power would therefore be insufficient to override such a right.

A. *Parental Authority*

Parents' rights to enforce the teaching of their own values are reinforced each time the schools are successfully charged with a failure to teach values or with enforcing wrong or bureaucratically perverted values. It is not altogether clear, however, how paramount the parental rights can be when they are faced with the legitimate claims of the state. Inquiry into the legitimacy of claimed parental rights becomes even more intense when those rights are confronted with the rights of the children themselves. Where preservation of the family and protection of parental rights are declared by the state to be within its own compelling interest, there is no immediate legal problem. But the forces brought to bear upon society by emancipating pressure groups, *e.g.*, the poor, the ethnic or the female, have also prompted the appearance of militant groups working for the rights of particular age categories, whether the very old or the young. The movement for the emancipation of the child is beginning to make itself felt. The most telling current erosion of parental rights has come from attacks upon the theory that the blood

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labor, Prince v. Massachusetts, 321 U.S. 158, 160-61 (1944), or nonattendance of primary schools, Shapiro v. Dorin, 199 Misc. 643, 99 N.Y.S.2d 830, 837-39 (Dom. Rel. Ct. 1950), *aff'd mem. sub nom.*, People v. Donner, 278 App. Div. 705, 103 N.Y.S.2d 757, *aff'd mem.* 302 N.Y. 857, 100 N.E.2d 48, *modified,* 302 N.Y. 883, 100 N.E.2d 57, *appeal dismissed,* 342 U.S. 884 (1951), was involved. The courts have refused to declare as parental wrongdoing insistence upon sending children to private schools, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925), offering children equivalent education at home, State v. Massa, 95 N.J. Super. 382, 231, A.2d 252, 257 (Morris Co. Ct. 1967), or withholding children from secondary school for religious reasons, Wisconsin v. Yoder, 406 U.S. 205 224-25 (1972). Since the application of the parens patriae doctrine depends on parental malfeasance or dereliction of duty, there is no overlap between that doctrine and the in loco parentis doctrine in value teaching. Under the latter, all values that parents may teach may be taught by the school whereas under the former schools may insist on teaching those values that parents should teach but, in fact, do not.

bond is the best legal principle to regulate domestic relations[43] and from mounting advocacy of legal autonomy for minors.[44] Although the various efforts to formulate a bill of rights for children have not been sufficiently defined,[45] they do lend new force to the old contention by educational progressives that the children are right in fifty per cent of the conflicts between children and adults.[46]

Goldstein, Freud and Solnitz have questioned the propriety of equating the child's best interest with the "blood is thicker than water" principle.[47] Domestic relations law is no longer willing to accept the priority of the parents' blood claim without reservation.[48] Where the psychological parent doctrine[49] has been accepted, the court is permitted to view other persons as more fit to assume guardianship over minors than blood parents.

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[43] Blood bond has never been determinative of the treatment of unwed fathers under the law. Indeed, in most states, the father is liable for child support but is without unconditional visitation rights without the consent of the mother. See K. Davidson, R. Ginsburg & H. Kay, Sex Based Discrimination 322 (1974). The putative father's right to notice and hearing in custody and adoption cases won in Stanley v. Illinois, 405 U.S. 641 (1970), has been limited in such cases so as to exclude his right of consent and has been accorded solely to the unwed mother. *E.g.*, *In re* Adoption of Malpica-Orsini, 36 N.Y.2d 568, 331 N.E.2d 486 (1975). Even his right to notice is not deemed absolute, but instead is a matter of good faith effort by the state. *See generally* Barron, *Notice to the Unwed Father and Termination of Parental Rights: Implementing* Stanley v. Illinois, 9 Fam. L.Q. 527 (1975).

More generally, the effect of J. Goldstein, A. Freud & J. Solnitz, Beyond the Best Interest of the Child (1973), has been an increase in protection for adoptive and foster parents from attacks by blood parents who wish to have their children back. The parental preference rule was denied in Painter v. Bannister, 258 Iowa 1390, 1396, 130 N.W.2d 152, 156, *cert. denied*, 385 U.S. 949 (1966), in which maternal grandparents were confirmed in their foster care against a fit but bohemian father who wished to have his son back upon remarriage.

[44] *E.g.*, Bennett v. Jeffreys, 40 N.Y.2d 543, 546, 356 N.E.2d 277, 281, 387 N.Y.S.2d 821, 825 (1976) ("[A] child is a person, and not a subperson over whom the parent has an absolute possessory interest."). For a review of developments in this area, see Katz, Schroeder & Sidman, *Emancipating Our Children—Coming of Legal Age in America*, 7 Fam. L.Q. 211 (1973).

[45] Note, *State Intrusion into Family Affairs: Justification and Limitations*, 26 Stan. L. Rev. 1383, 1391 (1974). *See also* Children's Rights, *supra* note 40.

[46] The essence of progressive educational theory is that instruction should be child-centered rather than subject-centered and that appeal to the child's interest, harmonious gradual mental development, and positive rewards for effort and achievement will best ensure good learning. Such learning emphasizes internalizing good rules of conduct and love for intellectual learning in preference to an encyclopedic memorization of vast amounts of subject matter. Progressive educational theory generally has aimed toward intellectual and moral emancipation of the child. It is a direct heir to the theories of Rousseau, who believed that good education is grounded in isolation of the child from the degenerate influences of the adult world and in reliance on the spontaneous individual process of mental and moral growth inherent in the law of nature. The Educational Theory of Jean Jacques Rousseau (W. Boyd ed. 1963). For a general overview of these developments, see L. Cremin, The Transformation of the School: Progressivism in American Education 1876-1957 (1961).

[47] J. Goldstein, A. Freud & J. Solnitz, *supra* note 43.

[48] See note 43 *supra*.

The child may now have to be represented by its own lawyer in matters pertaining to custody or other disposition. Children are acquiring limited rights to control their own property,[50] to make contracts[51] and to sue parents for torts.[52] Parental rights of consent to marriage[53] or abortion[54] have been significantly limited. In addition, the tender years doctrine[55] has been attacked by feminists who claim that it is irrational to regard men as less adept than women in raising infants.[56] Feminists have also pressed for government child care allowances to subsidize the cost of infant care either at home or in day care centers. Implementation of such a scheme would, of course, be financed by all taxpayers including those who do not undertake the responsibility of parenthood.[57] Moreover, the freedom of conscience clauses of the Constitution[58] may well be interpreted one day also to protect children against invasion of thought by all adults, including their parents. In short, the rights of parents to impose their values on their children are no longer ironclad. The surface of the problem has yet to be penetrated and, from any point of view, it "is a challenge to everyone concerned with student rights—one with which we have not yet fully come to terms."[59]

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[49] The psychological parent doctrine, in the words of one reviewer of J. GOLDSTEIN, A. FREUD & J. SOLNITZ, *supra* note 43, states that

> the real parent is one who nurtures the child totally; physically and psychologically. The biological parent who has abandoned the child, for any reason, should have no right to reclaim him at a future date because of birth ties. For a child, the experience of separation cannot be measured in the time sense of adults. It is almost always perceived as total abandonment because of his own worthlessness. Child placement decisions must take into account the law's incapacity to supervise interpersonal relationships and its limits of knowledge for long range prediction.

Hummell, Book Review, 53 CHILD WELFARE 189 (1974). For excellent book reviews exploring the limitations and qualifications of the psychological parent doctrine, see Dembitz, Book Review, 83 YALE L.J. 1304 (1974) and Straus & Straus, Book Review, 74 COLUM. L. REV. 996 (1974)

[50] Control of a child's property must be in the hands of a guardian during minority and is regulated by various state statutes. "Normally the parent of a child will be appointed the guardian of the estate but the mere relationship of parent and child does not give the parent the right to administer the estates of the child." H. CLARK, DOMESTIC RELATIONS 513 (1974). The lowering of the age of majority and the removal of parent-child immunity in tort actions has increased the power of minors to influence the management of their estates. *Id.*

[51] A person under the age of majority may make contracts and enforce them, but he has the right to disaffirm them if they should be asserted against him at any time before reaching majority and for a reasonable time thereafter. *See, e.g.,* Warwick Mun. Employees Credit Union v. McAllister, 110 R.I. 399, 293 A.2d 516 (1972). *See also* H. CLARK, *supra* note 50, at 515.

[52] The right to sue parents for torts was initiated by Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963), which moved away from such

> immunity prospectively in all negligence actions except those based on an excercise of parental authority over the child or ones involving parental discretion with respect to the provision of food, clothing, housing, and similar services to the child. As is apparent from the *Goller* case, abolition of the immunity necessitates facing up to the problem of parental discipline.

C. FOOTE, R. LEVY & E. SANDER, CASES AND MATERIALS ON FAMILY LAW 344 (1966).

[53] *See, e.g.,* Harrigfeld v. District Court, 95 Idaho 540, 511 P.2d 822, 826-27 (1973) (statute requiring parental consent to marriage for males between 18 and 21 held invalid on equal protection grounds). *Contra,* Friedrick v. Katz, 73 Misc. 2d 663, 341 N.Y.S.2d 932, 934-35 (Sup. Ct. 1973) (statute requiring parental consent to marry for males under 21 upheld), *rev'd on other grounds,* 34 N.Y.2d 987, 360 N.Y.S.2d 415 (1974).

[54] *See In re* Smith, 16 Md. App. 462, 295 A.2d 238, 245-46 (Ct. Spec. App. 1972) (permitting 16-year-old to have her baby against wishes of mother who wanted child to procure an abortion); Washington v. Koome, 84 Wash. 2d 901, 530 P.2d 260, 264-66 (1975) (affirming minors' rights to abortion against parents' wishes and without their consent).

B. *In Loco Parentis*

The authority of the school and state to stand in loco parentis has also been weakened.[60] One can no longer assume the existence of a traditional unity of purpose between home and school. Implicit in the schools' parental standing is the consent and support of parents. In most educational systems of the world, administration of the systems are nationally centralized, and parental consent has been assumed to vest in the state ab initio.[61] Accordingly, parental rights to influence the actual day-to-day life of the schools are severely limited by law.[62] In the United States, where parents and the public enjoy the maximum freedom to interfere, swings of public opinion especially affect parents' attitudes toward the schools. Recent proposals to issue parents with vouchers instead of compelling them to send children to public schools are a sufficient sociological index of the current wave of disaffection. As Professor Morris[63] has put it:

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[55] The "tender years doctrine," although not labeled as such, was defined in Vanden Heuvel v. Vanden Heuvel, 254 Iowa 1391, 121 N.W.2d 216, 220 (1963), as "the presumption that a young child will be best advantaged by being placed in the custody of the mother." The court stated:

> We are also aware that this presumption has been weakened somewhat in recent years, so while it may be said such a presumption is not strong and can readily be overcome by other evidence, there must be some such substantial evidence. Thus, as a general rule the court would be right, save in exceptional circumstances, in holding the mother best-fitted to care for her child of tender years.

121 N.W.2d at 220.

[56] For attacks on the tender years doctrine in legal literature, see H. CLARK, *supra* note 50, at 868, 869 n.2a. *See also* Moezie v. Moezie, Fam. Div. ¶ D 3535-71 (D.C. Sup. Ct. 1973), *cited in* K. DAVIDSON, R. GINSBURG & H. KAY, *supra* note 43, at 250, 251-52, which stated that custody should be "vested in the individual or parent who fulfills most adequately the mothering function, i.e., the nurturing—physical, emotional and psychological—which a child needs to become a well adjusted individual in our society." On these criteria, *Moezie* assigned the custody of three infant children to the father in preference to a fit mother.

[57] *See generally* K. DAVIDSON, R. GINSBURG & H. KAY, *supra* note 43.

[58] U.S. CONST. amend. I, cl. 1 (freedom of religion); U.S. CONST. amend. V, cls. 3 & 4 (protection against self-incrimination and the deprivation of life, liberty or property without due process); U.S. CONST. amend. IV, § 1, cl. 4 (equal protection of state laws).

[59] Buss, Book Review, 46 U. COLO. L. REV. 627, 649 (1975). Professor Buss presents a comprehensive and discerning review of three major textbooks on law and education: S. GOLDSTEIN, LAW AND PUBLIC EDUCATION (1974); D. KIRP & M. YUDOF, EDUCATION POLICY AND THE LAW (1974); and A. MORRIS, THE CONSTITUTION AND AMERICAN EDUCATION (1974). Other available texts on this subject include: E. REUTTER & R. HAMILTON, THE LAW OF PUBLIC EDUCATION (1970); R. HAMILTON & P. MORT, THE LAW AND PUBLIC EDUCATION (2d ed. 1959); THE SUPREME COURT AND EDUCATION (D. Fellman ed., 1960); R. STRAHAN, *supra*, note 41. *See also* W. HAZARD, EDUCATION AND THE LAW (1971); Bereday, *Education Law*, 30 EDUC. FORUM 313 (1966).

[60] See note 41 *supra*.

> Although frequently intemperate in tone, to my mind, many of the negative comments contain merit. More disturbing is that they all point to a similar conclusion: that the goals of American education no longer seem to be supported by a clear community consensus.[64]

In loco parentis rights have been awakened with the growth of parental disenchantment and suspicions. Corporal punishment in the schools, the traditional symbol of the doctrine, has been on the decline through disuse or statutory prohibition even though it has been upheld in a qualified fashion by the courts.[65] Legislation aimed at destroying the secrecy of student files[66] has brought in the open another area of conflict between parents and teachers. The application of university discipline is no longer based on a claim to parental mandate[67] and dormitory, curfew and similar regulations designed to protect student morality have been removed.[68] Attacks on the states' rights to enforce compulsory education laws span the period between *Pierce v. Society of Sisters,*[69] which affirmed parental rights to comply with compulsory education laws through private institutions, and *Wisconsin v. Yoder,*[70] which allowed Amish parents to refuse to comply with compulsory secondary education laws because the compulsion violated their religious principles. Yet, even protection of religious principles, the ground upon which compulsory education has been limited, has not received total judicial endorsement.[71] It is fairly certain that compulsory education statutes will remain on the books. Indeed, their continuing strength and persistence erodes the notion that the rights of the school to teach values derive solely or even in major part from parental consent.

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[61] *See* Bereday, *A Comparative Look at English, French and Soviet Education,* 35 CURRENT HIST. 165, 166-67 (1958), *reprinted in* 14 EDUC. LEADERSHIP 215, 216-17 (1959); G. BEREDAY, *supra* note 8, at 112-13.

[62] For examples of statutes abroad which limit parental rights, see Hall, *The Waning of Parental Rights,* 1973 CAMBRIDGE L.J. 24.

[63] A. MORRIS, *supra* note 59.

[64] *Id.* at xiii.

[65] Glaser v. Marrietta, 351 F. Supp. 555 (W.D. Pa. 1972), and Ware v. Estes, 328 F. Supp. 657 (N.D. Tex. 1971), *aff'd per curiam,* 458 F.2d 1360 (5th Cir.), *cert. denied,* 409 U.S. 1027 (1972), are the leading cases affirming the right of the schools to administer corporal punishment. Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.), *aff'd,* 423 U.S. 907 (1975), carried this rule further by affirming the right of teachers to administer such punishment over the objections of parents. The state is limited, however, by the requirement that it show a legitimate interest in imposing such punishment, administer it according to written rules free from overbreadth or vagueness, and use it without excessive force. After Goss v. Lopez, 419 U.S. 565, 574-75 (1975) (due process required before suspension is ordered) and Wood v. Strickland, 420 U.S. 308, 319-22 (1975) (school officials may be liable for damages if they order expulsion without due process), the state may also be obligated to apply due process before punishment. For further discussion of the implications of these cases, see 4 J. LAW & EDUC. 565, 641 (1975). New Jersey, which ostensibly prohibits corporal punishment by statute, provides exceptions and permits the use of physical force to quell disturbances threatening physical injury, to obtain weapons or other dangerous objects in students' possession, to allow self-defense by teachers and to protect persons and property. N.J. STAT. ANN. § 18A:6.1 (West 1975). In spite of the legal position, corporal punishment is on the decline and the number of cases dealing with it has diminished. R. HAMILTON & P. MORT, *supra* note 59, at 473. *But see* Ingraham v. Wright, 97 S. Ct. 1401, 1415-18 (1977) (upheld the constitutionality of a Florida statute permitting corporal punishment provided no "excessive" force is used).

Nevertheless, substantial residual parental rights do remain intact under common law[72] or by statute[73] and often vest in the schools by assignment or consent. Thus, as long as a modicum of such harmony is present, the power of the school to impart moral education is probably unassailable. Even if agreement breaks down, however, the state is not without resources since it may employ an escalating scale of legal arguments which permit some form of value teaching.[74]

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[66] *E.g.*, 20 U.S.C. § 1232g-1232i (Supp. V 1975) (commonly referred to as the Buckley Amendment).

[67] "The in loco parentis doctrine has generally been rejected as a basis for university discipline." S. GOLDSTEIN, *supra* note 59, at 432.

[68] For example, at Barnard College in 1965, a female student who moved in with her boyfriend was punished by decision of a joint faculty-student committee for fraudulently listing her residence as being at a lodging approved by the college. However, such restrictive rules as to curfew, signing out, visits and overnight stays in dormitory rooms have been swept away for both sexes. N.Y. Times, Aug. 23, 1968, at 41, col. 7.

[69] 268 U.S. 510 (1925). *Pierce* stopped the bid for a "take-over" of all education by public schools.

[70] 406 U.S. 205 (1972). It should be noted that the right to refuse to comply with the laws was not extended to the primary level of education. Though *Yoder* is a new barrier to the states' prerogative to impose compulsory education, it is too optimistically viewed as the "parents' charter," empowering parents to resist compulsory education in broader circumstances.

[71] Wisconsin v. Yoder, 406 U.S. 205 (1972), has not overruled Shapiro v. Dorin, 199 Misc. 643, 99 N.Y.S. 2d 830 (Dom. Rel. Ct. 1950), *aff'd mem. sub nom.,* People v. Donner, 278 App. Div. 705, 103 N.Y.S. 2d 757, *aff'd mem.,* 302 N. Y. 857, 100 N.E.2d 48, *modified,* 302 N.Y. 883, 100 N.E.2d 57, *appeal dismissed,* 342 U.S. 884 (1951), which refused Hassidic Jews the right to withhold their children from compulsory attendance in public schools because such attendance violated their religious beliefs. The language of this case, when coupled with the rationale of *Yoder,* suggests that the courts will respect such religious beliefs only in cases where they are not contrary to the compelling state interest of providing all children with educational training which will assist them in obtaining intellectual, vocational and cultural opportunities for a successful life in society. The Hassidic training which was proposed as an alternative to public education was found to be too narrow for that purpose. For a discussion of other cases dealing with Yeshiva Jews, Muslims and Buddhists, see D. KIRP & M. YUDOF, *supra* note 59 and Wasinger, *Freedom and Public Education: The Need for New Standards,* 50 NOTRE DAME LAW. 530 (1975).

[72] For a discussion of common law authority for parental rights over children, see notes 40 and 41 *supra.*

C. *Parens Patriae*

The parens patriae principle requires an implication of parental incompetence and generally has been used to justify state regulation of private schools.[75] Although it is most criticized for its callous application,[76] the doctrine continues to be the foundation for the termination of parental rights.[77] Parens patriae also confers upon the state the right to protect children from parents' desires to benefit from child labor[78] and permits the state to apply civil and criminal sanctions in child abuse and parental non-support cases.[79] Despite its traditional coupling with the principle of defending the best interests of the child, critics decry the state's action as parent by right, rather than by parental delegation, as too narrow a protective framework.[80] Insofar as value education is concerned, the parens patriae doctrine received its first setback in *Meyer v. Nebraska*[81] which forced public schools to find a more per-

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[73] For a survey of the statutory law supporting parental rights, see Riskin, *Telling Tales Out of School: Some Legal Problems*, 78 TCHRS. C. REC. 229, 232 (1976).

[74] W. HAZARD, *supra* note 59, at 4.

[75] In Farrington v Tokushige, 273 U.S. 284 (1926), the court found Hawaii's regulation of its foreign language schools excessive, but approved such regulation in principle:

> We of course appreciate the grave problems incident to the large alien population of the Hawaiian islands. These should be given due weight whenever the validity of any governmental regulation of private schools is under consideration; but the limitations of the Constitution must not be transcended.

Id. at 299; *see* D. KIRP & M. YUDOF, *supra* note 59, at 32 (general discussion of the scope of governmental regulation of nonpublic education).

[76] *See, e.g.*, P. MURPHY, OUR KINDLY PARENT . . . THE STATE: THE JUVENILE JUSTICE SYSTEM AND HOW IT WORKS 4 (1974).

[77] *Id.* Parens patriae is also the basis for enforcing compulsory school attendance. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the state stipulated the sincerity of the parents' religious beliefs in withholding their children from public schools. Had their sincerity been questioned and had state evidence prevailed, the Amish theoretically could have been restrained from harming their children by application of the parens patriae doctrine. See note 42 *supra*. Indeed, the *Yoder* Court drew an express distinction between the Amish and groups "claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life." 406 U.S. at 235.

[78] Prince v. Massachusetts, 321 U.S. 158 (1944) (parents denied right to employ children to distribute religious literature in public places even though under adult supervision).

[79] *See* H. CLARK, *supra* note 50, at 378 n.9, 379 n.10, 473 n.5.

[80] *See* Note, *supra* note 45, at 1291-92.

[81] 262 U.S. 641 (1923).

> Parents have traditionally been considered to have the primary right, a natural right, to control their children's nurture. In a line of cases beginning with Meyer

suasive rationale for excluding the teaching of German than the "Americanization" of German immigrants.[82] Subsequently, the Supreme Court's decision in *Stanley v. Illinois*,[83] allowed the state to overcome the historical respect for the parental bond by showing merely a "powerful countervailing interest."[84]

Nevertheless, even in well-documented child abuse cases the termination of parental rights is not easily secured.[85] Thus, if state protection is so difficult to trigger when parents are such obvious wrongdoers, the utility of parens patriae rapidly diminishes in less acrimonious areas. Parental actions, however objectionable they might be, are constitutionally protected whenever a religious or civil liberties nexus can be found. The utility of parens patriae in value teaching is thus limited to matters in which parental unfitness can be judicially determined or where marital conflict necessitates that the state step in as an arbitrator.

D. The Schools' Authority As An Extension of the State's Police Power

The broadened notion of state rights in education rests on the exercise of police power which, in turn, is founded upon preservation of societal interests rather than on parent-child obligations. Only a century old, state rights to educate citizens for common community purposes have established themselves even in individualistic countries.[86] Thus

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> v. Nebraska [262 U.S. 641 (1923)] and Pierce v. Society of Sisters [268 U.S. 510 (1925)], the Supreme Court has taken this 'natural right' concept and translated it into substantive due process protection for the liberty of parenthood.

Note, *supra* note 45, at 1384.

[82] *Meyer* was a landmark case which declared unconstitutional a state prohibition against teaching modern foreign languages below the ninth grade, thus nullifying a statute undoubtedly enacted for patriotic reasons. In a similar case, even when patriotic reasons were combined with questions of the quality of education offered, the state was prohibited from enforcing unduly burdensome regulations in Hawaii's foreign language schools. Farrington v. Tokushige, 273 U.S. 284, 298-99 (1927).

[83] 405 U.S. 645 (1970).

[84] *Id.* at 651. In *Stanley* the Supreme Court invalidated an Illinois statute which denied unwed fathers parental rights equal to those of unwed mothers and married parents. In mandating the right to notice and hearing to such fathers prior to deprivation of parental rights, the Court defined the place of the parental bond as "[t]he private interest . . . of a man in the children he has sired and raised [which] undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id.*

[85] It is even harder to secure a criminal conviction. Parental incest adjudications are a good case in point. Simply removing the offending parent may deprive the rest of the family of a head of household and wage earner whose behavior toward other members of the family may have been without blame. The more frequent solution—removal of the child victim—visits the punishment for incest upon that child and, as often as not, exposes it unintentionally to further risk of molestation in detention homes.

[86] For example, in the United States many states specify parts of the curriculum content, define and enforce general rules of conduct for young persons in and out of school, specify conditions of graduation and in some measure require educational certification as

Wisconsin v. Yoder,[87] while making limited inroads into the state's power to enforce compulsory secondary education laws, pronounced the interests of the state as "of admitted validity in the generality of cases."[88] By basing its actions on the exercise of police power, the state avoids the strict judicial scrutiny which is otherwise mandated before compelling state interests may prevail over fundamental rights.[89] Accordingly, the state may require health measures such as inoculation[90] or lunch consumption on school premises,[91] and, within limits, compulsion or suspension of the right to attendance,[92] enforcement of dress codes,[93] and generally specified curriculum, disciplinary and moral behavioral rules for youngsters both in and outside school buildings.[94] Professor Morris, noting that the Supreme Court has yet to clearly define the concept, has written the following on the subject of police power:

> The result is that state legislatures can legislate directly on the subject of education unless their state constitutions forbid them, because nothing in the federal constitution precludes state authority. The constitutions of most states require that their state legislatures create a system of public schools. This means then, that state legislatures generally have the power to see to it that schools are built, to require that certain persons attend school and to prescribe the curriculum, methods and goals of education.[95]

The principle of state power has also survived the decision in *Tinker v.*

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a condition of entry into particular occupations. *See also* R. HAMILTON & E. REUTTER, *supra* note 3, at 18-29.

[87] 406 U.S. 205 (1972).

[88] *Id.* at 221.

[89] Riskin, *supra* note 73, at 230.

[90] Cude v. Arkansas, 237 Ark. 927, 377 S.W.2d 816 (1964); *accord,* Mannis v. Arkansas, 240 Ark. 42, 398 S.W.2d 206 (1966) (extending vaccination requirement to parochial schools). *But see* A. MORRIS, *supra* note 59, at 77 (students exempt from vaccination if religion prohibits it).

[91] Flory v. Smith, 145 Va. 164, 134 S.E. 360 (1926) (upholding school regulation which prohibited children from going home for lunch).

[92] *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925). *See also* Goss v. Lopez, 419 U.S. 565 (1975); Wood v. Strickland, 420 U.S. 308 (1975).

[93] Though there has been a judicial movement toward the limitation of the school's power to enforce a dress and hair length code, the matter is not clearly resolved. Professor Goldstein summarized the situation as follows:

> There have been hundreds of federal cases in this area in recent years. Courts have considered and disagreed about whether or not hair and dress rules involve First Amendment protection of symbolic speech, or are otherwise violative of constitutional principles of equal protection, overbreadth, or vagueness, or . . . notions of privacy and substantive due process.

S. GOLDSTEIN, *supra* note 59, at 354.

[94] For a detailed discussion of such conditions, see R. HAMILTON & E. REUTTER, *supra* note 3, at 18-29.

[95] A. MORRIS, *supra* note 59, at 115.

Des Moines Independent Community School District,[96] which affirmed pupils' rights of freedom of political expression. The "disruption" exception—that such freedom is to be given only if it does not disrupt the orderly course of education[97]—has been refined in a number of cases[98] which reaffirm the right of the state to exercise the police power to enforce exposure to education.

E. The Rights of Recipients of Moral Education

The growing and sometimes excessive exercise of state power has spurred the movement to a higher constitutional standard in school-parent-pupil relations. The insistence on due process in juvenile delinquency proceedings mandated by *In re Gault*[99] was followed by a similar requirement for protection of student rights in school suspensions.[100] Moreover, *Tinker*[101] began the process of redefining state power by extending due process guarantees to students.[102]

1. The "Right" to Education

The American judicial system has long recognized the distinction between the right to receive an education and the duty to attend school.[103] In most state statutes "the norm of universal public education is broader than the compulsory education mandate, including within its bounds all students who have a positive legal right to attend school."[104] It is thus of little surprise that compulsory education statutes specify a narrower age range for those under a duty to attend than for those who have a right to attend.[105]

Although nearly all state constitutions guarantee free public education to their citizens,[106] the United States Supreme Court has thus far refused to accord education the status of a fundamental right.[107] Only where the state has engaged in deliberate discrimination in education will the Court find sufficient justification for interference.[108] This "minimum protection approach" continues to be the standard despite rising demands for what Tyll Van Geel has termed "Principle I" or "the affirmative duty of a state to assure each child access to a minimally adequate education."[109]

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[96] 393 U.S. 503 (1969) (upholding students' right to wear black armbands to protest the Vietnam War).

[97] *Id.* at 512-13.

[98] *E.g.*, Gusick v. Drebus, 431 F.2d 594, 600-01 (6th Cir. 1970), *cert. denied,* 401 U.S. 948 (1971) (allowing prohibition against wearing buttons with political messages due to history of racial and political divisiveness and hostilities within student body). For discussion of other cases refining the disruption exception, see S. GOLDSTEIN, *supra* note 59, at 323; D. KIRP & M. YUDOF, *supra* note 59, at 152.

[99] 387 U.S. 1, 31-58 (1967) (mandating certain due process rights be afforded in juvenile court proceedings).

[100] *See* Wood v. Strickland, 420 U.S. 308, 319-22 (1975); Goss v. Lopez, 419 U.S. 565, 574-75 (1975). For further discussion, see S. GOLDSTEIN, *supra* note 59, at 455; D. KIRP & M. YUDOF, *supra* note 59, at 190; A. MORRIS, *supra* note 59, at 661.

[101] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

[102] See note 125 *infra.*

[103] See S. GOLDSTEIN, *supra* note 59, at 14.

[104] *Id.*

[105] *Id.*

[106] Mississippi was the last state to adopt a compulsory education law. Act of April 15, 1977, ch. 483, 1977 MISS. LAWS 819. Although the act has been called a "compulsory"

Several states, however, have already moved from minimal equal protection to a higher affirmative duty. The California Supreme Court, for example, has applied equal protection strictures to strike down school finance laws which effectively sanctioned an unequal geographical distribution of educational privileges.[110] Pennsylvania recently accepted a consent judgment requiring provisions of free public education for all children, including the mentally retarded.[111] More recently, New Jersey was forced to levy an income tax to assure adequate schooling through a ruling which affirmed the state's constitutional commitment to provide "thorough and efficient" education.[112]

Prominent lawyers with an interest in education have stimulated a nationwide interest in exclusions from the schools.[113] Issues such as illegal expulsions, suspensions and misclassification of students have been

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attendance law, in fact it contains no enforcement provision and speaks in terms of "cooperation" rather than mandatory compliance. *Id.* at 823. Two other states, South Carolina and Virginia, which repealed compulsory education laws in the 1950's, have reinstated them. S.C. CODE § 21-757 (Supp. 1975); VA. CODE § 27-275.1 (Supp. 1976); S. GOLDSTEIN, *supra* note 59, at 13. Compulsory education statutes only tangentially reflect upon the power of the state to teach values. Forty-nine state constitutions, all except Connecticut, require the state to provide educational opportunities. *Id.* at 13-14. Accordingly, decisions have to be made concerning value teaching for students attending voluntarily as well as for those who are compelled to do so.

[107] In San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 23-25 (1973) the Supreme Court, to the chagrin of the educational community, declined to take that step.

[108] For a discussion of this proposition and cases which reflect this view, see Van Geel, *Does the Constitution Establish the Right to an Education?*, 82 U. CHI. SCH. REV. 293, 301 (1974).

[109] *Id.* at 297.

[110] Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 1250-62, 96 Cal. Rptr. 601 (1971).

[111] Pennsylvania Assoc. for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1262 (E.D. Penn. 1971). *See generally* L. LIPPMANN & I. GOLDBERG, RIGHT TO EDUCATION (1973); Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40 (1974).

[112] Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, 283-85, 288-89, *cert. denied*, 414 U.S. 976 (1973). *See also* Tractenberg, *Reforming School Finance Through State Constitutions:* Robinson v. Cahill *Points the Way*, 27 RUTGERS L. REV. 365 (1974).

[113] *See, e.g.*, J. COONS & S. SUGARMAN, FAMILY CHOICE IN EDUCATION: A MODEL STATE SYSTEM FOR VOUCHERS (1971); J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970); Coons, *Financing Public Education after* Rodriguez, 1 SAT. REV. WORLD, October 9, 1973, at 44.

brought to public attention and made the subject of litigation.[114] Denial of proper opportunity was first singled out for attack on equal protection grounds not only because it is most consistent with the American ethos of attaining the widest possible mass attendance,[115] but also because exclusions from school are most easily reached by litigation. The ideal of mass attendance is itself a value and a society which fosters it proclaims the faith that opportunity for mental enlightenment is a birthright that the community is obligated to provide.

2. The "Right" to Value Education

Questions of the right to access have tended, however, to overshadow the question of the right to receive quality education. Recent years have brought the appearance of malpractice suits which seek damages for alleged miseducation.[116] In light of the rise of anti-school litigation which preceeded them, such suits are viewed "as the natural result of a progression of judicial incursions into the operation of the schools."[117] But major difficulties arise as a result of judicial inadequacy to determine the nature of miseducation and inability to assess damages.[118] These procedural difficulties notwithstanding, the substantive significance of these cases has been to raise the conflict over a legal right to quality education to the level of those conflicts over the legal right to presence in the schools. As the postulates for "thorough and efficient"[119] education acquire revitalized legal force, the question of whether there is a right to substance must include the subsidiary question of whether that right also embraces an entitlement to learn values.

In criminal law, the question whether the offender can distinguish between right and wrong has always been at issue.[120] In England, for example, a child between the ages of eight and fourteen is presumed incapable of making the distinction. However, that presumption may be rebutted in court and an eight-year-old child may be subjected to juvenile delinquency proceedings.[121] Where there is accountability in court there must by analogy exist a right to be taught right from wrong by the society which establishes these values. This duty is especially important for American schools because American parents are subject to only a small monetary tort liability for acts of vandalism and are not, as are parents in the Soviet Union,[122] liable for the moral miseducation of their children. The legal right to learn values at school may be deduced from the language of *Yoder*[123] and *Tinker*[124] which both speak of one purpose of schooling as the acquisition of competencies for citizenship.[125] By analogy, then, there must be a right to acquire civic training.

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[114] *See* CHILDREN'S DEFENSE FUND, CHILDREN OUT OF SCHOOL IN AMERICA (report to the Wash. Research Project, Inc., 1974).

[115] *See generally* G. BEREDAY, UNIVERSITIES FOR ALL (1973).

[116] *See generally* Sugarman, *Accountability Through the Courts,* 82 U. CHI. SCH. REV. 233 (1976).

[117] *Id.* at 235.

[118] *Id.* at 250.

[119] Tractenberg, *supra* note 112, at 386, 389.

[120]
> [A] man is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment.

Trial of Edward Arnold, Kingston Assizes 1724, 16 Howel's St. Trials 695, 764.

> It is not enough, to relieve from criminal liability, that the prisoner is morally depraved . . . . It is not enough that he has views of right and wrong at variance with those that find expression in the law. The variance must have its origin in some disease of the mind.

People v. Schmidt, 216 N.Y. 324, 110 N.E. 945, 949-50 (1915).

> Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.
>
> . . . .

Right to education questions include not only whether all persons should have access to learning centers and whether all have a right to a high quality of instruction, but also who is to determine the values to be taught. The traditional response has been to vest this right of determination in the hands of a learned elite. This response, as old as the ideal of Platonic guardians, is based upon the premise that men steeped in intellectual learning and imbued with the humility and compassion that comes with wisdom are the best instrument to guide the intellectual and moral destiny of the nation. History has yet to adjudicate the full merits of this position. Alongside the development of the learned elite concept the ideas of Jacksonian America have presented the virtues of greater plurality, greater dissemination of responsibility and the virtues of rugged individualism.

> 2. (b) *Knowingly.* A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962).

[121] For a discussion of the English treatment of delinquents, see BRITISH INFORMATION SERVICES, THE TREATMENT OF OFFENDERS IN BRITAIN 29 (I.D. 1328, Feb. 1960).

[122] See H. BERMAN, JUSTICE IN THE U.S.S.R. 333 (1963). In light of the different emphasis placed on the parental role in each country, the standards seem rather inconsistent.

[123] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[124] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

[125] For example:

> [S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.

Wisconsin v. Yoder, 406 U.S. 205, 211 (1972).

Moreover, students "are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 511 (1969).

Given the steady growth of ideas of "national interest" in all spheres of national life, including education, the landmark decision in *Tinker*[126] seems to be moving the balance in favor of the pluralistic view. The Court spoke eloquently against the notion of schools as "enclaves of totalitarianism."[127] Students "in schools as well as out"[128] were pronounced to be " 'persons' under our Constitution"[129] whose fundamental right to freedom of speech or expression does not stop "at the schoolhouse gate."[130] The Court stated that it has "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools."[131] This control must, however, be "consistent with fundamental constitutional safeguards."[132] Under this view, pluralism in value determination should not give rise to "undifferentiated fear or apprehension of disturbance"[133] and postulates of regimentation antithetical to postulates of freedom of expression.[134]

From an international perspective it is immensely significant that a nation's lawfully elected representatives can commit the country to a war but cannot obligate the school children to verbal and physical support of such commitment. Rather, even though he is flanked by the home and the school—the universal fountainheads of value formation—the American child is once again forced to take the initiative as to his own value formation.

3. The "Duty" to Learn Values

If students have an individual right to form values, do they also have the duty to do so? There recently has been a flare-up of proposals, most of them by lawyers, to teach law in high schools.[135] These proposals suggest a growing recognition that to behave within legal bounds children must be expected to learn about legal norms in the schools. Beyond legal behavior lies the entire gamut of conventional and purely moral behavior. Even in such a free and relaxed society as America, the students must learn rituals, conventions, modes of approach, address and proper decorum to facilitate present and subsequent adult adjustments. Witnesses of school transgressions, for example, must learn to show preference for the values which require that they tell the truth to the authorities over those which bid them to protect their schoolmates. Above all, youngsters have a constitutional obligation to learn the supreme values of American citizenship—the courage to question authority, to resist injustices and oppression, and to take individual and collective action to remedy abuses.

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[126] 393 U.S. 503 (1969).

[127] *Id.* at 511.

[128] *Id.*

[129] *Id.*

[130] *Id.* at 506.

[131] *Id.* at 507.

[132] *Id.*

[133] *Id.* at 508.

[134] *Id.*

[135] *E.g.*, Conrad, *Youth Legal Education and its Growth in Hawaii: Its History*, 15 Educ. Perspectives 23 (1976).

In the ultimate analysis, the duty to learn values comes from natural law. Man is a social animal. His strong prohibitions against murder and suicide suggest that a duty to live and to preserve life exists. This duty includes the preservation of the human race and forces society to agonize over matters such as abortion, capital punishment, war, euthanasia, and "right to die" laws. He is obligated to learn values of cohabitation with others through avoiding exploitation, refraining from spreading disease, not inflicting pain, and controlling pollution. Indeed, Robert Nisbet has recently written that man's sociological duty is to establish order and to provide himself with maximum freedom within it.[136]

The same interests—personal and social—suggest that man has a duty to perfect himself through education. Since that education begins at birth, the teaching of values would seem to implicate the cooperation of home and school. The legal caveats against this stance come from the fact that compulsory attendance laws are a form of servitude and that such a deprivation of freedom is more readily justifiable when enacted to promote the learning of intellectual or practical skills than when imposed to encourage values education. Notions of compulsory brainwashing are justly repugnant to Americans.[137] But here too, fashion intervenes. In the Fifties there was loud public outcry against schools teaching conformity. Books such as Jacobs' *Changing Values in College*[138] deplored the presence of security-minded students who opted for quiet integration into the existing occupational structure. In the Sixties the mood of the young and the adults changed. Radicalism and a reformist spirit on one hand, and "hippie withdrawal" on the other, were deplored. The legal debate as to what values the students may be compelled to learn lags far behind its social science counterparts. The progeny of *Tinker*[139] does suggest once again a minimal rather than total approach.[140] The general concern is with what students may not be taught or compelled to do. There is room for a broad standard of what students may be legally compelled to learn in the realm of values.[141]

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[136] R. NISBET, SOCIOLOGY AS AN ART FORM 38 (1976).

[137]
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matter of opinion or force citizens to confess by word or act their faith therein.

West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[138] P. JACOBS, CHANGING VALUES IN COLLEGE (1957).

[139] 393 U.S. 503 (1969).

[140] See note 98 *supra*.

III. VALUES MANDATED BY LAW

All values regulated by the prohibitions of law are mandated for teaching in the schools. Since American law is a combination of common law and statutes, the profile of values to be enforced has roots in the customs of the people, in the acts of their elected representatives and in their interpretations by the professional judiciary. The protests against the judiciary's increasing power in the law enforcement area evidence the jealously guarded nature of the privilege of lawmaking by the people.[142] Moreover, the popular character of the American law makes the school's duty to teach the law even more persuasive.

American schools are first obligated to condemn treason against the state.[143] The exemptions from saluting the flag[144] and protection for flag burners,[145] when contrasted with the prohibition of draft card destruction,[146] have established more intricate delineations for the school's legal right to teach affirmative patriotism.[147] Prohibitions against treason are the threshold for minimal patriotism. It is treason under the Smith Act[148] to conspire to advocate the overthrow of the government of the United States or a state by violent means. Although the Supreme Court upheld the statute in 1951,[149] its decision in *Yates v. United States*[150] subsequently modified that holding. Under *Yates*, when there is no clear and present danger of overthrow, a mere abstract advocacy of the doctrine of forcible overthrow is permitted.[151] More recently, the Court held in *Brandenburg v. Ohio*[152] that the state may not forbid such advocacy if there is no immediate lawless action or likelihood that it will take place.[153]

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[141] Professor Goldstein has written:

> The central fact in the distinction between higher and lower education is the role of value inculcation in the teaching process. The public schools in the United States traditionally have viewed instilling the young with societal values as a significant part of the schools' educational mission.

Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach,* 124 U. PA. L. REV. 1293, 1342-43 (1976).

[142] *See, e.g.*, L. LUSKY, BY WHAT RIGHT? (1975); Glaser, *Towards an Imperial Judiciary?,* 41 PUB. INTEREST 104 (1975).

[143] *E.g.*, Bay v. State Bd. of Educ., 233 Ore. 601, 378 P.2d 558 (1963), which upheld the state school board's denial of an elementary school teaching license to a person who, several years earlier, had been convicted of burglary. The court reasoned:

> [A] teacher in a public school is the key factor in teaching by precept and example the subjects of honesty, morality, courtesy, obedience to law, and other lessons of a steadying influence which tend to promote and develop an upright and desirable citizenry, as required by . . . statutes.

Id. at 604, 378 P.2d at 561.

[144] West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). For further discussion, see Wasinger, *supra* note 71.

[145] Street v. New York, 394 U.S. 576, 587-88 (1969).

[146] United States v. O'Brien, 391 U.S. 367, 382 (1968).

[147] *Cf.* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), *reversing* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940). *Barnette* invalidated the schools' prerogative to compel students to salute the flag or suffer suspension and established the distinction between teaching the American way of life and forcing declaration of beliefs. 319 U.S. at 631, 637. Outside of the education field, Stromberg v. California, 283 U.S. 359 (1935), and Street v. New York, 394 U.S. 576 (1969), prohibited punishing persons for respectively displaying banners in opposition to organized government and for burning the flag. However, a federal statute punishing draft card burners was upheld in United States v. O'Brien, 391 U.S. 367 (1968), and desecration of the flag by displaying it in defendant's art gallery wrapped around a phallic symbol was punished in Radich v. New York, 401

The dividing line of the law on treason thus seems to be drawn between abstract advocacy and a more purposeful one. First, it is the legal duty of the schools to teach at least the prohibition against advocacy which will result in "immediate lawless action." In practice it would be inconceivable for a school to tolerate even an abstract advocacy of treason, though some may find it repugnant that a government should so insulate itself against the threat of its extinction. The moral limitation that freedom of thought should not include freedom to abolish freedom will continue to have the force of a legal principle in the schools as long as the constitutional conduct of the business of government in general, and of elections in particular, it not thereby prevented.

Second, those rights protected by constitutional law must be engrained in the values taught to children in schools. Respect for individual rights to life, person and property should be taught by mandate and are but highlights of a long list of guarantees enjoyed by American citizens which they must be taught to appreciate as children.

Third, criminal law prohibitions should be taught as a matter of course. Crimes against persons should be made repugnant. Distinctions must be drawn between murder and manslaughter, capital punishment and lynching, abortion and euthanasia, menacing and harassment. Crimes against property should be graded into violent and non-violent, corporate and personal. The schools should also distinguish between tax evasion and tax avoidance and between conspiracy and solicitation.

Fourth, a further range of values based on principles of tort law is mandatory. The concepts of negligence, contributory negligence and

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U.S. 531 (1971). After Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), these precedents appear to define permissive and forbidden behavior in the schools subject to the already entrenched disruption standard discussed in notes 96 through 98 and accompanying text *supra*.

[148] 18 U.S.C. § 2385 (1970).

[149] Dennis v. United States, 341 U.S. 494, 515-16 (1951).

[150] 354 U.S. 298 (1957).

[151] *Id.* at 321-22.

[152] 395 U.S. 444 (1969).

[153] *Id.* at 447.

comparative negligence should be explained. Similarly, the distinction between defamation of private persons and criticism of of public officials should be defined. Indeed, the principles forbidding assault and battery and torts against children have special relevance to the world of education.[154]

Fifth, concepts of contract law are relevant to the teaching of morality. Acting in good faith is a central moral concept to be forcefully juxtaposed with fraud or misrepresentation. The requirement of mutuality vividly contrasts with unconscionability, overreaching, duress and adhesion. The notion of a bargained-for exchange further refines mutuality and that general respect for other human beings without which no self-interest can be presumed to be to everyone's advantage. Penalties for breach reinforce the lessons of contract law. The obligation to make the injured party whole again, just as damages in tort law, teaches youngsters the principle of restoring the harmony after a disturbance of principles without which a flexible society could never operate.

These central values upheld by law are or could be woven into various aspects of the curriculum, such as social studies, and even more meaningfully into a general pattern of school exhortations. They represent a residuum that is legally irreducible. Yet, around this hardcore requirement there exists a vast welter of equally unassailable customs and moral precepts that the schools convey to youngsters by mandate of the public and its traditions. It is against the background of these values that areas legally prohibited or undefined in value teaching must be reviewed.

IV. VALUES PROHIBITED BY LAW

Among the values whose teaching the law prohibits, the ban on religious teaching is foremost and certainly unique. American schools do not outlaw religion as do the schools in the Soviet Union. There is neither dispute about how much religion should be taught, as in Belgium,[155] nor serene compromise to read the Bible without commentary as in England.[156] The United States views itself as a nation "under God" and, as such, it has long permitted the existence of private religious schools.[157]

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[154] Psychologists have long been aware that one of the most serious problems a young child faces in school is avoidance of physical and psychological pain inflicted by other children. *E.g.*, G. LEHNER & E. KUBE, THE DYNAMICS OF PERSONAL ADJUSTMENT 234, 248 (1955).

[155] *See, e.g.*, Malinson & DeCoster, *Church and State Education in Belgium*, 4 COMP. EDUC. REV. 43, 46 (1960). *See also* CHURCH & STATE, *supra* note 2, at 335.

[156] *See, e.g.*, Lee, *Church, State and School in England: A Study in Tradition and Innovation*, II, 56 TCHRS. C. REC. 237, 316, 321 (1955). *See also* CHURCH AND STATE, *supra* note 2, at 20.

[157] *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

The Constitution prohibits establishment of religion[158] and provides the legal norm in the United States. Within this norm, the case law has moved in two contradictory directions. In matters of financing, the strict ban on assigning state funds to religious private schools has been somewhat eroded,[159] while the customary religious practices that gradually crept into public school curriculums have been recently banished. Four prohibitions in particular have been reestablished: (1) there can be no religious teaching on public school premises;[160] (2) prayers are not permitted in the schools; [161] (3) reading from the Bible without commentary is not permitted;[162] and (4) the salute of the flag and the accompanying oath cannot be forced on religious objectors.[163] The limits of this enforcement are set by other premises: (1) students can be released from school earlier in the day so that they may obtain religious instruction elsewhere;[164] (2) compulsory education cannot be extended beyond eight years for those whose religion may find the requirement objectionable;[165] and (3) teaching a course such as "Bible as Literature" is permitted.[166] The upshot of these premises is that those who wish to include religious instruction in their schooling may do so legally by attending private school,[167] by leaving school early each day[168] and by early dropout from public schools.[169] It is only partly correct to say that American law forbids education with a religious component. Thus, the constitutional position of the state is defined as one of strict neutrality.[170]

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[158] U.S. CONST. amend. I.

[159] Everson v. Board of Educ., 330 U.S. 1, 16-18 (1947), authorized expenditure of public funds for transporting children to parochial schools. Board of Educ. v. Allen, 392 U.S. 236 (1968), affirmed the state's right to furnish books to parochial school students, a practice begun after the ruling in Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370, 374-75 (1930) (use of tax revenues to supply textbooks to private schools does not constitute a taking of private property in violation of the fourteenth amendment). Subsequently, established schemes for indirect aid to parochial school parents and for shared facilities and time were described by Mr. Justice Douglas in Lemon v. Kurtzman, 403 U.S. 602 (1971).

> [T]he hydraulic pressures created by political forces and by economic stress were great and they began to change the situation. Laws were passed—state and federal—that dispensed public funds to sustain religious schools and the plea was always in the educational frame of reference: education in all sectors was needed . . . .

Id. at 629-30 (Douglas, J., concurring). When called to do so, the courts have repeatedly invalidated statutes permitting such disbursement of public funds. *See, e.g.*, Sloan v. Lemon, 413 U.S. 825 (1973) (invalidating state statute providing for partial reimbursement to parents for nonpublic school tuition); Tilton v. Richardson, 403 U.S. 672 (1971) (invalidating federal statute authorizing monetary grants for construction of buildings to be used exclusively for secular education at church-related colleges).

[160] Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 209-12 (1948).

[161] Engle v. Vitale, 370 U.S. 421, 424-25 (1962).

[162] Abington School Dist. v. Schempp, 374 U.S. 203, 223-26 (1963).

[163] West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[164] Zorach v. Clauson, 343 U.S. 306, 314-15 (1952).

[165] Wisconsin v. Yoder, 406 U.S. 205, 219 (1972).

[166] Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963).

[167] Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

[168] Zorach v. Clauson, 343 U.S. 306 (1952).

Electioneering is the second legal prohibition in schools, despite the fact that the lack of a voting franchise for those under eighteen years of age makes such questions moot. In practice, a classroom ban is in effect.[171] The rule is that teachers may engage in electoral campaigning outside schools,[172] but they are subject to dismissal if they endorse particular political candidates or election issues in the classroom.[173] Kirp and Yudof[174] have summarized the obligations of American schools in the political arena as follows:

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[169] Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).

[170] U.S. Const. amend. I. *See also* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 210-11 (1948), *quoting* Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947), which stated:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between church and State".

> [171] The position of the teacher is such that his participation in political matters is certain to be censured. Since he is an employee of the district and paid from public funds, those who oppose his political views will naturally resent what they might term subsidizing the opposition.

R. Hamilton & P. Mort, *supra* note 59, at 403. *See also* Bereday, *The Role of Teachers in Politics,* 80 Sch. & Soc'y 150 (1954).

[172] Board of Educ. v. Akers, 243 Ky. 177, 47 S.W.2d 1046, 1047 (1932). In *Akers,* a county school board refused to appoint a teacher who had participated in the election of a subdistrict trustee. The court held that the teacher could not be refused appointment on these grounds.

[173] *E.g.,* Goldsmith v. Board of Educ., 66 Cal. App. 157, 225 P. 783, 789 (1924) (teacher dismissed for speaking out in class in favor of one of the candidates running for election as county school superintendent). *See* Pickering v. Board of Educ., 391 U.S. 563 (1968). In *Pickering,* a teacher was dismissed for publishing a letter critical of the school board in a local newspaper. In ordering the teacher's reinstatement, the Court established a balancing test which takes into account both a teacher's interests as a citizen to comment on matters of public concern and the state's interest in protecting the efficiency of the educational process. *Id.* at 568. For further discussion of the *Pickering* case, see Note, *Judicial Protection of Teachers' Speech: The Aftermath of Pickering,* 59 Iowa L. Rev. 1256 (1974). For a thorough review of recent cases in this area, see Goldstein, *supra* note 141.

[174] D. Kirp & M. Yudof, *supra* note 59.

> The evidence about the public school teacher in the United States forms a consistent picture. Teachers are expected to, and do, propagate political views and beliefs appropriately labelled "consensus values." Teachers should not, and generally do not, use the classroom as a forum for discussion of "partisan values" and controversial positions. Democracy, the two-party system, free enterprise, basic freedoms, and so forth, are not only permissible subjects in the classroom; the teacher is expected to urge these beliefs on his students. Liberal or conservative positions, foreign policy views, party allegiances, on the other hand, are seen as partisan values; and the teacher generally is expected to avoid particular interpretations of such issues.[175]

The ban on electioneering extends more broadly into a general ban on political indoctrination of any consistently maintained political ideology. American schools are bound instead to teach the general framework within which political discussions may take place with a view toward their successful resolution. This "indoctrination against indoctrination" is, of course, taught as a cherished value. As expressed by Professor Morris:

> Freedom in America implies a trust in the individual. The person is expected to think for himself and to come to his own conclusions. . . . The American proposition of freedom is that a person is free to find and speak the truth that is in him and that the official views come afterward. The American trusts in the free individual. On that we have staked our all.
>
> This is not to say that the state can never place restraints on schools. . . . On the other hand, it is to say that when the state places a restraint upon liberty that restraint, itself, must be justified before it can be allowed. Freedom is the fundamental preference and the basic postulate. Limitations on it must be justified and can be no broader than their justifications.[176]

Additional political prescriptions for the schools include exemption from saluting the flag.[177] The schools are enjoined to teach the American way of life but not to interfere with personal beliefs.[178] Black armbands to protest war[179] and black berets to distinguish ethnic membership[180] are permitted when they are not disruptive. Some forms of communication, however, are prohibited, *e.g.*, displays of confederate flags[181] when they lead to student irritation.[182]

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[175] *Id.* at 91.

[176] A. MORRIS, *supra* note 59, at 208-09.

[177] *E.g.*, West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[178] *Id.* at 631.

[179] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 508-09 (1969).

[180] *See* Hernandez v. School Dist. Number One, 315 F. Supp. 289, 292 (D. Colo. 1970).

[181] Augustus v. School Bd., 361 F. Supp. 383, 389 (N.D. Fla. 1973).

[182] Black armbands were permitted in Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 508-09 (1969), but declared disruptive in a school where more

In a metaphor, American political education is not a steel pipe but a rubber hose. The schools provide an essential framework of beliefs which each individual fills with his own expanded interpretation.

V. TEACHING VALUES: AREAS OF UNCERTAINTY

Squaring actual school practices with the law is most difficult in the grey areas between explicit mandate and strict prohibitions. The schools, the state commissioners in their adjudicative functions, and the courts must perform the intricate job of balancing the police power of the state, parental rights and duties as delegated to the schools, and the rights and duties of the students themselves. Nowhere else is this difficulty more obvious than in the area of sexual values.[183] The changing or rather ambivalent attitudes which Americans display toward sex are reflected in discussions about student rights in the school curriculum.

It is not altogether clear under what circumstances the school may legally convey to students information about sexual intercourse, childbirth and related matters. There are no direct Supreme Court decisions on the subject. However, a New Jersey case[184] held that a course on human sexuality cannot be forced upon those children whose religious beliefs; as represented by their parents, are violated by advocacy of a future social conduct approved by the majority. Such courses may, however, be offered to "fully" consenting persons.[185] Sex education remains a controversial subject, particularly if taught outside the biology context. The course is offered only in those schools in which the parents and the public were persuaded by sex educators to permit its teaching.[186]

Questions of what kinds of sexual behavior may be taught represent a more complex legal problem. The traditional American ethos is to uphold the ideal of strict premarital chastity for both sexes and to punish extramarital transgressions. Most state fornication and adultery statutes, though they are seldom invoked, remain on the books.[187] The

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than one-third of the pupils were children of military personnel. Hill v. Lewis, 323 F. Supp. 55, 58 (E.D.N.C. 1971).

[183] See Trebbel, *Sex Education: Yesterday, Today, and Tomorrow*, 65 TODAY'S EDUC. 70 (1976).

[184] Valent v. State Bd. of Educ., 114 N.J. Super. 63, 274 A.2d 832, 840 (1971). However, a year earlier Maryland's right to mandate the teaching of sex education absent danger to any religious principles was upheld.

> The plaintiffs further assert that they have the exclusive constitutional right to teach their children about sexual matters in their own homes, and that such exclusive right would prohibit the teaching of sex in the schools. No authority is cited in support of this novel proposition, and this Court knows of no such constitutional right.

Cornwell v. State Bd. of Educ., 314 F. Supp. 340, 342 (D. Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970).

[185] Valent v. State Bd. of Educ., 114 N.J. Super. 63, 274 A.2d 832, 841 (1971).

[186] *See* Trebbel, *supra* note 183.

[187] For a collection and discussion of statutes forbidding fornication and adultery, see

persistence of this disapproval is evidenced by a recent case[188] which affirmed the dismissal of a teacher who, without violating any existing rule, discussed questions of prostitution, deflowering and premarital relations without indicating his disapproval of such matters. Only recently has the widespread policy of prohibiting school attendance by unwed mothers begun to give way despite continuing protests by school officials that exclusion symbolizes the school's moral condemnation.[189]

Yet, even in law, punishment for statutory rape varies according to the age of the offender, suggesting greater legal leniency when the offender is himself a minor.[190] The widespread youth practices of necking or petting are largely condoned even on the school grounds.[191] The transformation of moral standards in society at large was bound to affect attitudes within the schools. There continues to be, however, a perhaps understandable incongruity between the ideal standards which the courts and the schools uphold and the actual practices which in all ages and places fall short of these ideals.

A more general moral issue in the schools is whether it is constitutionally permissible for schools to employ present incentives to achievement. The less tangible the issue the harder it is to find guidance. Is the formulation of standards of attainment by educational experts consistent with equal protection guarantees? There are also questions regard-

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H. HART, LAW, LIBERTY AND MORALITY 26 (1963).

[188] State *ex rel.* Wasilewski v. Board of School Directors, 14 Wis. 2d 243, 111 N.W.2d 198, 206-07 (1961).

[189] *See* Ordway v. Hargraves, 323 F. Supp. 1155, 1158 (D. Mass. 1971) (ordered readmission of a pregnant unmarried high school senior). Unwed mothers were also ordered readmitted in Perry v. Grenada Mun. Separate School Dist., 300 F. Supp. 748, 753 (N.D. Miss. 1969). *See also* Shull v. Columbus Mun. Separate School Dist., 338 F. Supp. 1376, 1377-78 (N.D. Miss. 1972) ("School officials remained unconvinced and had to be told again."); K. DAVIDSON, R. GINSBURG & H. KAY, *supra* note 43, at 867. *But see* Houston v. Prosser, 361 F. Supp. 295 (N.D. Ga. 1973), where the court upheld the bar against readmission to day school of a 15-year-old unmarried mother, reasoning that "students who marry or become parents are more precocious than other students and the mixing of these two groups of students will lead to the disruption of the school." *Id.* at 298. Although the school policy of not readmitting unmarried mothers was declared unconstitutional as applied, *id.* at 299, the plaintiff was required to attend night school, rather than day school. The *Perry* approach, however, is submitted as the more realistic alternative.

> The Court would like to make manifestly clear that lack of moral character is certainly a reason for excluding a child from public education. But the fact that a girl has one child out of wedlock does not forever brand her as a scarlet woman undeserving of any chance for rehabilitation or the opportunity for future education. . . . If the board is convinced that a girl's presence will taint the education of the other students, then exclusion is justified. Nevertheless, the inquiry should be thorough and weighed in keeping with the serious consequences of preventing an individual from attaining a high school education.

300 F. Supp. at 753.

[190] *See, e.g.,* N.Y. PENAL LAW §§ 130.25, .30 (1965), which grade statutory rape not only according to the age of the victim, but also according to the age of the offender.

[191] *See, e.g.,* E. SMITH, THE AMERICAN YOUTH CULTURE 8 (1964).

ing due process in evaluation and grading procedures. The Chinese have now abolished all surprise examinations, and reports of student progress are more dependent upon "open book exams and day to day evaluations."[192] One might ask whether such procedures square better with our Constitution, whether grading on curves is legal, and whether it is in the national interest to select our best minds to enter our law schools only to tell one-half at the end of the first semester that they are in fact below average in achievement.[193] Is inculcation of competitive spirit and selective promotion equitable, and, if not, is the opposite a denial of the maximum opportunity to benefit from education? What of the value of enforced hard work and discipline? If it is not an invasion of privacy to mold people through exhortation, is it an invasion to attempt behavior modification through conditioning? The schools walk a precarious balance in trying to stimulate those who may not want to be stimulated while restraining rapid learners who threaten to run out of sight. This balance is accomplished if the school is competent. If it is not, what long list of torts may it be charged with?

VI. CONCLUSION

Rights to exposure to sexual matters and determination of general attitudes toward achievement have been singled out in this article as polar examples of the many areas in the teaching of values that have not been settled in the law.[194] Each branch of law has provisions that do not square with conventional morality as taught in the schools. The duty to retreat does violence to our notions of courageously resisting the aggressor. Absence of duty to rescue has a strange ring against good samaritan exhortations. These two divergences should be narrowed by more widespread teaching of legal concepts in the schools and statutory reform designed to bring the law closer to prevailing culture. Entitlement to welfare, for example, fits poorly with the notions of industry, thrift and self-reliance that have been taught as traditional American virtues.

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[192] *See* Whyte, *Educational Reform: China in the 1970's and Russia in the 1920's,* 18 COMP. EDUC. REV. 112 (1974). *See also* T. CHEN, THE MAOIST EDUCATIONAL REVOLUTION, (1974). The death of Mao contemplates a new reform, the full nature of which is as yet unforeseeable.

[193] See Bereday, *First Semester at the Law School,* 103 INTELLECT 460, 463 (1975). While values dealing with sexual matters are the most precisely defined in the legal grey areas, the values attached to competitive, as against contemplative, school attitudes are among the most nebulous. For a pioneering article on the relation of school classification to constitutional rights, see Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification,* 121 U. PA. L. REV. 705 (1973). Professor Kirp ends with a plea "to protect school children against the too often ill-considered, arbitrary and hurtful distinctions made by their elders." *Id.* at 797. *See generally* S. GOLDSTEIN, *supra* note 59, at 159. The problem raised in the realm of values, however, is somewhat broader. In this era of overpopulation, under-employment and ecological destruction, it becomes relevant to ask whether it is in accordance with state interest and within the interests of individuals to compel all persons to undergo indoctrination to enter the ranks of an achieving society. It is a disturbing thought that John Adams once stated:

> I must study politics and war, that my sons may have liberty to study mathematics and philosophy . . . geography, natural history and naval architecture, navigation, commerce and agriculture, in order to give their children a right to study painting, poetry, music, architecture . . . tapestry, and porcelain.

FAMILIAR LETTERS OF JOHN ADAMS AND HIS WIFE ABIGAIL ADAMS DURING THE REVOLUTION 380 (1875).

[194] The list of areas in the realm of values which are unsettled in the law can be expanded unendingly. Further examples include: (1) Can the school teach values contrary

Beyond these specific contradictions lie other issues. Is not the general encouragement of political activism, culminating as it now does with proposals to legislate a compulsory vote,[195] an invasion of the privacy of those individuals who do not wish to participate? The tasks before the schools have always been an inducement of voluntary civic participation. Or, to use Margaret Mead's remark from another area of values, how does adult society punish youngsters for using marijuana, while it holds a cigarette in one hand and a drink in another?[196]

In international law, should the schools teach the paramountcy of national interest or should the students be taught to act against national interest if a wider value demands it? At issue here is the balancing of international and national interests since enlightened self-interest has always involved a measure of altruism.

There are also disagreements over whether the schools should teach the reformative intent or the resulting demoralization of juvenile law exemptions. Because of the widely divergent views on this issue, there is a need for a more realistic view about rights and duties of children to bring the notions of discipline as rehabilitation into balance with that of deterrent.

Because they are so closely tied to local interests, American schools are like the American people. They intuitively reflect the lives and views of the average. They have been courageous arenas in which reduction

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to the prevailing government policy? (2) Can the school advocate higher or lower taxes or teach how to avoid taxes? (3) Can the school speak out against the abuses of capitalism or of labor unions? (4) Can the school encourage research designed to discredit our legal system or to expose abuses of lawyers? (5) Can the school condemn student abuses by satirizing their behavior in a manner offensive to their dignity? (6) How far and by what means can the school attempt to change working class behavior of students into middle class behavior? (7) If the school may insist on correct spelling, may it also insist on correct grammar? (8) May the school condemn the vulgarity, low mental level and other excesses of the communication media? (9) Should students be encouraged to criticize other students' poor school progress in public meetings, posters and school newspapers?

[195] For advocacy of compulsory voting, *see, e.g.*, R. NADER, K. PHILLIPS & P. BLACKMAN, ELECTORAL REFORM AND VOTER PARTICIPATION, 69 (1975).

[196] *Competitive Problems in the Drug Industry: Hearings on the Present Status of Competition in the Pharmaceutical Industry Before the Subcommittee on Monopoly of the Select Committee on Small Business*, 91st Cong., 1st Sess. 5469 (1969) (statement of Margaret Mead).

of class, race and sex discrimination has been attempted. The perennial question is still with us: Should not the schools, like the churches or the courts, be *better* than the American people? Perhaps they should represent the highest uncompromising moral standards, to be heard and respected even if those standards cannot always be followed in practice. Should the schools and their standards reflect life or be preparation for life? But more realistically, how are they to adjust their basic function of providing instruction with their duty to provide inspiration?

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RECENT DECISIONS

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—NO PROBABLE CAUSE REQUIRED TO SEARCH A VESSEL AT THE BORDER OR ITS FUNCTIONAL EQUIVALENT REGARDLESS OF WHETHER THE VESSEL IS ENTERING OR LEAVING THE COUNTRY

After notification that a substantial quantity of marijuana had been discovered on a coastal landing pier, officers of the Coast Guard and the Customs Patrol[1] apprehended and conducted a warrantless search of the defendants' ship in United States territorial waters approximately nine miles off the California coast.[2] During the course of the search, some 11,000 pounds of marijuana were found on board the vessel.[3] The United States subsequently brought a criminal action against the defendants charging them, *inter alia*,[4] with the illegal importation of marijuana. The government claimed that there was sufficient probable cause[5] to search the vessel without a warrant or, in the alternative, that the search could be sanctioned without probable cause as a customs search.[6] The defendants contended that no probable cause existed for a warrantless search of their ship[7] and, since there was no evidence that they had sailed from foreign waters, that the search could not be sanctioned as a border search.[8] The United States District Court for the Northern District of California agreed with both of the defendants' contentions and granted their motion to suppress all evidence seized in the warrantless search.[9] On appeal to the United States Court of Appeals for the Ninth Circuit, *held,* reversed and remanded. The search of a vessel which has crossed a border or the functional equivalent of a border constitutes a valid border search regardless of whether the vessel is entering or leaving the United States, and no showing of probable cause for the search is required. *United States v. Stanley,* 545 F.2d 661 (9th Cir. 1976).

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[1] Officers of the Coast Guard and the Customs Patrol are collectively considered "officers of the customs." 19 U.S.C. § 1401(1) (1970).

[2] The defendants' ship was singled out for search because it was the only one of five vessels passing the pier that day which was not well known in the area. In addition, the ship was rigged for albacore fishing which, at the time of the search, was available only in distant fishing grounds. United States v. Stanley, 545 F.2d 661, 663-64 (9th Cir. 1976).

[3] *Id.* at 663.

[4] The defendants were also charged with possession with intent to distribute, conspiracy to import and conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1), 846, 952(a) and 963 (1970).

[5] Probable cause exists where

> "the facts and circumstances within [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.

Brinegar v. United States, 338 U.S. 160, 175-76 (1949), *quoting* Carroll v. United States, 267 U.S. 132, 162 (1925); *accord*, Hamer v. United States, 259 F.2d 274, 282-83 (9th Cir. 1958), *cert. denied*, 359 U.S. 916 (1959). *See generally* Note, *Probable Cause to Seize and the Fourth Amendment: An Analysis*, 34 ALB. L. REV. 658 (1970).

[6] Customs searches are authorized by 19 U.S.C. § 1581(a) (1970), which provides in part:

> Any officer of the Customs may at any time go on board of any vessel . . . at any place in the United States or within the customs waters . . . and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle and use all necesary force to compel compliance.

[7] The defendants produced evidence that their vessel was rigged in the same manner as 60% of the vessels in the area and, therefore, no reason existed to isolate the vessel for search. 545 F.2d at 664.

[8] *Id.*

When the colonies sought their independence from Great Britain in the eighteenth century, one of the most oppressive actions to which they objected was the unbridled authority given to the King's officers to search and seize private property.[10] Consequently, when the Bill of Rights was passed by Congress in 1789, the fourth amendment was included to protect the public from such unreasonable searches and seizures.[11] Fifty-four days before it adopted the Bill of Rights, however, the same Congress enacted a statute[12] which forged an exception to the fourth amendment prohibitions in the case of customs or border searches.[13] In creating this exception, Congress distinguished searches of buildings within the country from searches of vessels entering the country, requiring a search warrant only for searches initiated within the country.[14] The United States Supreme Court, in its seminal interpretation of the statute,[15] agreed with Congress' distinction and concluded that since a search and seizure of goods concealed to avoid the payment of duties is totally different from a search of a person's private books and papers, customs or border searches did not fall within the ambit of fourth amendment protection.[16] Accordingly, the lower courts have consistently recognized the existence of broad governmental authority to conduct warrantless border searches.[17] The Supreme Court, however, has persisted in its initial distinction between searches of persons entering the country and persons already inside the country. Notably, in *Carroll v. United States,*[18] the Court held that although a person crossing an international border may be searched without probable cause,[19] once that person is within the country, he has a right to free passage without interruption or search unless probable cause exists to believe that he is carrying contraband.[20] Under *Carroll,* only those customs searches which occur at the border or those which could otherwise be considered border searches are exempt from the constitutional mandate of probable cause.[21] In construing the *Carroll* requirements, the Second Circuit, in *United States v. Glaziou,*[22] opined that the term "border search" is not restricted to searches conducted on the actual border line, but is elastic and includes searches conducted within a reasonably extended geographic area in the immediate vicinity of the border.[23] Thus, in order to determine which searches are exempt from probable cause under *Carroll,* the courts have been compelled to decide which searches qualify as border searches or extended border searches.[24]

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[9] *Id.* The district court opinion was not reported.

[10] *See* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 54 (1937).

[11] U.S. Const. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The fourth amendment has been interpreted as requiring either a showing of probable cause or a valid judicially-issued search warrant before a search can be deemed reasonable. *See, e.g.,* Weeks v. United States, 232 U.S. 383, 393-94 (1914). *See also* Note, *The Right of the People to Be Secure: The Developing Role of the Search Warrant,* 42 N.Y.U.L. REV. 1119 (1967). A general analysis of probable cause, however, is beyond the scope of this Note.

[12] Act of July 31, 1789, ch. 5, 1 Stat. 29, 43 (1789).

[13] Border searches are "official searches which are reasonable because [they are] made solely in the enforcement of Customs laws." Alexander v. United States, 362 F.2d 379, 382 (9th Cir.), *cert. denied,* 385 U.S. 977 (1966). *See also* Note, *Search and Seizure at the Border—The Border Search,* 21 RUTGERS L. REV. 513, 515-16 (1967); Comment, *Border Searches: An Exception to Probable Cause,* 3 ST. MARY'S L. REV. 87, 87 (1971).

[14]
> Federal officers shall have full power and authority to enter any ship or vessel in which they have reason to suspect any goods subject to duty shall be concealed . . . and therein to search for any such goods; and if they shall have cause to suspect a concealment thereof in any dwelling house or building they shall, upon affirmation to any justice of the peace . . . be entitled to a warrant to enter . . . and there to search for such goods . . . .

Act of July 31, 1789, ch. 5, 1 Stat. 29, 43 (1789).

[15] Boyd v. United States, 116 U.S. 616 (1886).

In making this determination, each circuit has developed its own test or set of criteria. The Ninth Circuit, in *King v. United States,*[25] initially developed a test which validated a search away from the border only if there was constant surveillance of the suspect and the search was made within a reasonable time and distance after the actual border crossing.[26] Subsequently, however, the court rejected the *King* analysis and, in *Alexander v. United States,*[27] held that a valid border search was obtained if the "totality of surrounding circumstances," including, as dispensable elements, the type of surveillance and the time and distance elapsed, was sufficient to determine with reasonable certainty that contraband was aboard when a vehicle crossed the border.[28] The *Alexander* test was later applied by the circuit in upholding a search which had taken place 105 miles from the border and approximately seven hours after the suspect initially entered the country.[29] Even less stringent standards were developed in other circuits. In *Willis v. United States,*[30] for example, the Fifth Circuit set as its sole requirement the condition that the searching officer merely have "a reasonable cause to suspect" that a vehicle was carrying material illegally transported across a border.[31] The Second Circuit, in *United States v. Glaziou,*[32] went even further by permitting officers within its jurisdiction to search suspects without probable cause before a border crossing actually occurred.[33]

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[16] *Id.* at 623. More recently, the Ninth Circuit held that a search could violate the restrictions of the fourth amendment when conducted by police in the ordinary inland situation and yet be "reasonable" when conducted by customs officials in the lawful pursuit of unlawful imports. Alexander v. United States, 362 F.2d 379, 381 (9th Cir.), *cert. denied,* 385 U.S. 977 (1966). *See generally* Note, *At the Border of Reasonableness: Searches by Customs Officials,* 53 CORNELL L. REV. 871 (1968); Comment, *Border Searches and the Fourth Amendment,* 77 YALE L.J. 1007 (1968).

[17] *See, e.g.,* King v. United States, 348 F.2d 814, 818 (9th Cir.), *cert. denied,* 382 U.S. 926 (1965) (only requirement of a border search is that it be "reasonable"); Cervantes v. United States, 263 F.2d 800, 803 n.5 (9th Cir. 1959) (mere suspicion is sufficient to support a border search); Landau v. United States Attorney, 82 F.2d 285, 286 (2d Cir.), *cert. denied,* 298 U.S. 665 (1936) (border searches are to be of the broadest possible character). *See also* Comment, *Border Searches—A Prostitution of the Fourth Amendment,* 10 ARIZ. L. REV. 457, 458-59 (1968).

[18] 267 U.S. 132 (1925).

[19] The reference here, of course, is to the border search exception to the fourth amendment. The *Carroll* Court justified the exception on the ground that "national self-protection reasonably [requires] one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Id.* at 154.

[20] The Court reasoned that

> [i]t would be intolerable and unreasonable if [an officer] were authorized to stop every automobile on the chance of finding [contraband], and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.

Id. at 153-54.

[21] *Id.* at 154.

[22] 402 F.2d 8 (2d Cir. 1968), *cert. denied,* 393 U.S. 1121 (1969).

[23] 402 F.2d at 12.

[24] An extended border search is generally defined as a search away from the actual border, but within the so-called "elastic" border area. *Id.* at 13.

[25] 348 F.2d 814 (9th Cir.), *cert. denied,* 385 U.S. 926 (1965).

In addition to the judicial interpretations of the border search concepts, Congress has enacted two statutes granting customs officers broad search powers.[34] Significantly, these statutes authorize customs officers to conduct searches without probable cause and without regard to whether the search is conducted on a border. Indeed, early judicial interpretations of these statutes recognized that Congress had intended to give customs officers broad authority to search any vessel in United States territorial waters[35] without probable cause and without regard to whether a border had been crossed.[36] Later decisions echoed these constructions and permitted customs officers to search vessels regardless of their location if they were within the jurisdiction of the United States.[37] In *United States v. Weil,*[38] however, the Ninth Circuit refused to follow the current, in what appeared to be a legislative and judicial flood against fourth amendment rights, and held that the exercise of these broad statutory powers was restricted to border searches.[39] Thus, following *Weil,* many courts, at least in the Ninth Circuit, were again faced with the familiar problem of determining the framework and geographical parameters of a constitutional border search.[40]

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[26] 348 F.2d at 816. Specifically, the court held that a search eight miles from the border and subsequent to constant surveillance of the suspect after he had entered the country was a valid border search. *Id.* at 818.

[27] 362 F.2d 379 (9th Cir.), *cert. denied,* 385 U.S. 977 (1966).

[28] 362 F.2d at 382. In *Alexander,* the court upheld a search which had taken place several blocks from the border and approximately one hour after the suspect had entered the country. Again, the suspect had been under constant surveillance after he crossed the border. *Id.* at 382-83.

[29] Castillo-Garcia v. United States, 424 F.2d 482, 485 (9th Cir. 1970). The court stated that there was reasonable certainty that the 165 pounds of marijuana found in the defendants' vehicle had not been placed there after the defendants crossed the border. *Id. But see* United States v. Garcia, 415 F.2d 1141, 1144 (9th Cir. 1969) (search of a suspect 20 miles and two hours after he had crossed the border held invalid since there had been no surveillance and only a small amount of marijuana was found).

[30] 370 F.2d 604 (5th Cir. 1966).

[31] *Id.* at 605; *see* United States v. Reagor, 441 F.2d 252 (5th Cir. 1971). Although the *Reagor* court did not cite *Willis,* it did apply the *Willis* standard in holding that the search of a vehicle 60 miles from the border, even without surveillance of the suspect, was a valid search. *Id.* at 254-55.

[32] 402 F.2d 8 (2d Cir. 1968), *cert. denied,* 393 U.S. 1121 (1969).

[33] The court stated that

> [t]he class of persons who may be subjected to a border search is not limited to those suspected persons who are searched for contraband upon first entering the United States. When an individual has direct contact with a border area, or an individual's movements are reasonably related to a border area, that individual is a member of the class of persons that a Customs officer may, if his suspicions are aroused, stop and search while the individual is still within the border area.

402 F.2d at 13-14 (citations omitted).

[34] 19 U.S.C. §§ 482, 1581(a) (1970); *see* note 6 *supra.* Section 482 provides, in pertinent part, that

Finally, in 1973, the Supreme Court agreed to review the confusion and inconsistencies generated by the lower courts. In *Almeida-Sanchez v. United States,*[41] the government had relied on a portion of the Immigration and Nationality Act[42] to justify a search of the defendant's car by a roving border patrol

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> [a]ny of the officers or persons authorized to board or search vessels may stop, search, and examine . . . any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law.

[35] Although 43 U.S.C. § 1301 (1970) defines the territorial boundaries of the United States as extending only to the three-mile limit, officers of the Customs and the Coast Guard have been granted statutory authority by 19 U.S.C. § 1401 (1970) to search any ship within the 12-mile limit. Such authority was first given by the Tariff Act of 1790 (1 Stat. 145) and has been carried forward in every subsequent tariff act. The three and 12-mile limits refer to the distance extending from the ordinary low water mark of the United States coast into the Atlantic and Pacific Oceans and the Gulf of Mexico. 43 U.S.C. § 1301 (1970); *see* Gillam v. United States, 27 F.2d 296, 299-300 (4th Cir.), *cert. denied,* 278 U.S. 635 (1928) (the 12-mile limit is justified by the necessity for territorial security and law enforcement); The Reidun, 14 F. Supp. 771, 773 (E.D.N.Y. 1936) ("well settled" that the United States customs waters extend 12 miles from the coastline).

[36] *See, e.g.,* United States v. Wischerth, 68 F.2d 161, 161 (2d Cir. 1933) (search of defendant's vessel in a United States port held valid without a showing of probable cause); Olson v. United States, 68 F.2d 8, 10 (2d Cir. 1933) (search of vessel in United States territorial waters upheld despite lack of probable cause).

[37] *See, e.g,* United States v. King, 335 F. Supp. 523, 551 (S.D. Cal. 1971), *aff'd in part, rev'd in part on other grounds,* 478 F.2d 494, 508 (9th Cir.), *cert. denied,* 417 U.S. 920 (1973) (customs officers have absolute right to search vessels within United States territorial waters); United States v. Kayser, 322 F. Supp. 52, 54 (S.D. Ga. 1970) (statutes give broad authority to customs officers to search vessels within their jurisdiction).

[38] 432 F.2d 1320 (9th Cir. 1970), *cert. denied,* 401 U.S. 947 (1971). In *Weil,* the government has relied on 19 U.S.C. § 482 (1970) to conduct a search of the defendant's car several miles from the border. There had been no surveillance of the car after it crossed the border. The court remanded for a determination of whether the search qualified as a border search, holding that unless it was a border search it could not be conducted without probable cause under § 482. 432 F.2d at 1322-23.

[39] 432 F.2d at 1323.

[40] *See* notes 25 through 33 and accompanying text *supra.*

[41] 413 U.S. 266 (1973), *noted in* 1973 Wash. U.L.Q. 889.

[42] 8 U.S.C. § 1357(a)(3) (1970) provides that

> [a]ny officer or employee of the [Immigration and Naturalization] Service

twenty-five miles from the border.[43] Although the search complied with the applicable statutory requirements, the Court held that searches and seizures by border officials are subject to the same fourth amendment restrictions as any other search.[44] Additionally, the Court stated that, statutes notwithstanding,[45] the only searches customs officers may undertake without a warrant or probable cause are those which occur at the actual border or at "the functional equivalent of the border."[46] Since *Almeida-Sanchez* required the application of fourth amendment restrictions to all searches away from the actual border or its functional equivalent,[47] the Court effectively ended the initial debate among the circuits concerning the practical nature of an extended border search. Unfortunately, circuit division soon reappeared with respect to precisely what was required to establish a functionally equivalent border. Specifically, the Fifth Circuit and the Ninth Circuit divided over the question of whether a fixed checkpoint away from the actual border constituted its functional equivalent.[48] Again, the Supreme Court was summoned to resolve the dispute. As it had in *Almeida-Sanchez*,[49] the Court in *United States v. Ortiz*[50] adopted the Ninth Circuit's more protective view and held that such checkpoints are not the functional equivalents of a border.[51] Nevertheless, the Fifth and Ninth Circuits continue

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> authorized under regulations prescribed by the Attorney General shall have power without warrant . . . within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States.

[43] 413 U.S. at 268.

[44] *Id.* at 272.

[45] *E.g.*, 19 U.S.C. §§ 482, 1581 (1970); 8 *id.* § 1357; *see* notes 6, 34 & 42 *supra.*

[46] 413 U.S. at 272. The Court gave two examples of searches that would take place at the functional equivalent of a border:

> searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border [and] the search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City.

Id. at 273.

[47] *Id.* at 272; *see* Comment, *Extended Border Searches and Probable Cause*, 1973 WASH. U.L.Q. 889, 893; Note, *Area Search Warrants in Border Zones:* Almeida-Sanchez, 84 YALE L.J. 355, 355-56 (1975).

[48] In United States v. Hart, 506 F.2d 887 (5th Cir.), *cert. denied*, 422 U.S. 1053 (1975), the defendant was stopped at a permanent Border Patrol checkpoint 20 miles from the Mexican border. The ensuing search of his car uncovered a quantity of marijuana. 506 F.2d at 888. In sustaining the warrantless search, the Fifth Circuit held that the *Almeida-Sanchez* restrictions applied only to border searches conducted by roving patrols and, therefore, that searches made at permanent checkpoints near the border were not so restricted. *Id.* at 893-94. Conversely, on nearly identical facts, the Ninth Circuit, in United States v. Bowen, 500 F.2d 960 (9th Cir.), *aff'd sub nom.*, United States v. Ortiz, 422 U.S. 891 (1975), ruled that searches at fixed checkpoints away from the border, just as searches by roving patrols, violate the right to free passage once a person is within the United States. Thus, the court essentially applied the *Almeida-Sanchez* restrictions to inland fixed checkpoints. 500 F.2d at 962-63. *See generally* Comment, *Border Searches Revisited: The Constitutional Propriety of Fixed and Temporary Checkpoint Searches*, 2 HASTINGS CONST. L.Q. 251 (1974).

[49] See notes 41 through 47 and accompanying text *supra.*

[50] 422 U.S. 891 (1975).

[51] The Court equated searches at fixed checkpoints away from the border with roving

to apply different criteria in determining whether a given location is the functional equivalent of the border.[52] In *United States v. Tilton,*[53] the Ninth Circuit followed the reasoning of *Almeida-Sanchez* in holding that a customs search conducted without probable cause must occur at the border or its functional equivalent to be valid even though customs officers are vested with statutory authority[54] to conduct such a search anywhere.[55] Additionally, in *United States v. Solmes,*[56] the Ninth Circuit held that since it is not practical to search vessels at the actual border, *i.e.* the three-mile limit,[57] and since any material on board the vessel when it docks is likely to have been on the vessel when it crossed the border, a vessel that enters the jurisdiction of the United States from international waters and docks at a domestic port is deemed to be at the functional equivalent of the border.[58] It is not required that an officer actually see the vessel cross the three-mile limit if such a crossing can be presumed from the surrounding circumstances.[59] Thus, the *Tilton* decision manifests an intention by the Ninth Circuit to apply the *Almeida-Sanchez* restrictions to all customs searches. In keeping with its seemingly traditional distaste for the Ninth Circuit's interpretations of the law surrounding border searches,[60] the Fifth Circuit

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random searches since neither type of search effectively limits the officers' discretion in selecting those vehicles to be searched, resulting in a small number of random examinations. *Id.* at 895-96. *See also* Comment, *Minority Groups and the Fourth Amendment Standard of Certitude:* United States v. Ortiz *and* United States v. Brignoni-Ponce, 11 HARV. C.R.-C.L.L. REV. 733, 750-51 (1976).

[52] The Fifth Circuit requires proximity to the border and a substantial connection with an actual or suspected border crossing. United States v. Speed, 489 F.2d 478, 480 (5th Cir. 1973). The Ninth Circuit's factors, as stated in United States v. Bowen, 500 F.2d 960 (9th Cir.), *aff'd sub nom.,* United States v. Ortiz, 422 U.S. 891 (1975), include whether the search occurred at a location where virtually everyone searched had recently crossed the border and whether there was surveillance from the time of the border crossing to the time of the search. 500 F.2d at 965-66.

[53] 534 F.2d 1363 (9th Cir. 1976).

[54] 19 U.S.C. § 1581(a) (1970); *see* note 6 *supra.*

[55] 534 F.2d at 1364.

[56] 527 F.2d 1370 (9th Cir. 1975). *See also* United States v. Gonzalez-Rodriguez, 513 F.2d 928 (9th Cir. 1975), wherein the court stated in no uncertain terms that

> [a]rticles *which are intended to be or which are being removed from the United States in violation of law* are subject to seizure and forfeiture, together with the vehicle used to transport them.

Id. at 930.

[57] A vessel's crossing of the three-mile limit is equivalent to crossing a border of the United States. *See* United States v. Hill, 430 F.2d 129, 131 (5th Cir. 1970).

[58] 527 F.2d at 1372; *accord,* United States v. Tilton, 534 F.2d 1363, 1365 (9th Cir. 1976).

[59] 527 F.2d at 1372; *accord,* United States v. Tilton, 534 F.2d 1363, 1366 (9th Cir. 1976); *see* United States v. Ingham, 502 F.2d 1287, 1290-91 (5th Cir. 1974), *cert. denied,* 421 U.S. 911 (1975) (where defendant's vessel was sighted in international waters and later observed in a United States port, a border crossing could be presumed even though the vessel was not actually seen crossing the border). *See also* United States v. Hill, 430 F.2d 129, 131 (5th Cir. 1970) (where defendant was within the border area, a search of his vehicle qualified as a border search even though customs officers did not see the vehicle cross the border).

[60] *Compare* Alexander v. United States, 362 F.2d 379, 382 (9th Cir.), *cert. denied,* 385 U.S. 977 (1966) *with* Willis v. United States, 370 F.2d 604, 605 (5th Cir. 1966) and United

has suggested that it may not follow the *Tilton* decision. In *United States v. Ingham,*[61] the court drew a substantial distinction between a landlocked vehicle and a nautical vessel for purposes of a border search[62] and implied that it may not apply the *Almeida-Sanchez* standards to vessels searched at sea.[63]

Since virtually all of the cases applying the border search concept have involved attempts to import illegal material into the United States, there has been little case law as to whether material being taken out of the country may be seized in a warrantless border search. However, the two principal statutes providing for customs searches do not specifically limit such searches to inbound vessels or vehicles.[64] In fact, both statutes have been interpreted as applying to vessels which are not importing material into the United States. In *Cook v. United States,*[65] the Supreme Court noted that although previous statutes authorizing searches of vessels within the twelve-mile limit had been restricted to incoming vessels, section 581 of the Tariff Act of 1922[66] enlarged that authority to include other than inbound vessels.[67] In a similar context, the Tariff Act has also been construed to permit customs agents to inspect any cargo being shipped abroad.[68] Moreover, Congress has enacted statutes specifically intended to control exports which could serve as a basis for warrantless searches of outgoing vessels. The Export Control Act of 1949,[69] for example, has been supplemented with a regulation concerning searches.[70] In *United States v. Marti,*[71] a district

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States v. Hart, 506 F.2d 887, 894-95 (5th Cir.), *cert. denied,* 422 U.S. 1053 (1975) *with* United States v. Bowen, 500 F.2d 960, 966-67 (9th Cir.), *aff'd sub nom.,* United States v. Ortiz, 422 U.S. 891 (1975).

[61] 502 F.2d 1287 (5th Cir. 1974), *cert. denied,* 421 U.S. 911 (1975).

[62] 502 F.2d at 1290. Chief Judge Brown, writing for the panel, found cause to allude to the nation's infancy and the Deity in expressing the distinction.

> [L]oath as we are to suggest further distinctions in this dynamic ever-expanding area, this may well be a Reverian "one if by land, two if by sea." For there is by act of God, nature, the Congress, and the activities of man a great difference between the landlocked vehicle and the nautical vessel in relation to our International borders.

Id. Unfortunately, Chief Judge Brown did not elaborate further.

[63] *Id.* (dictum). If the Fifth Circuit refuses to apply the *Almeida-Sanchez* restrictions to searches at sea, such searches could presumably be conducted without regard to the border or its functional equivalent. *See* notes 35 through 39 and accompanying text *supra.*

[64] *See* notes 6 & 34 *supra.*

[65] 288 U.S. 102 (1933).

[66] Section 581 of the Tariff Act of 1922, Act of Sept. 21, 1922, Pub. Law No. 67-318, 42 Stat. 979, ch. 356, was reenacted in identical terms by the Tariff Act of 1930, Act of June 17, 1930, Pub. L. No. 71-361, 46 Stat. 747, ch. 497, and is currently codified at 19 U.S.C. § 1581 (1970).

[67] 288 U.S. at 114; *see* Olson v. United States, 68 F.2d 8, 10 (2d Cir. 1933) (construed the identical predecessor to 19 U.S.C. § 482 (1970) as extending the authority to searches of outgoing vessels).

[68] United States v. Chabot, 193 F.2d 287, 290 (2d Cir. 1951).

[69] 50 U.S.C. App. § 2021 (1970) (expired Dec. 31, 1969). The subject matter of the Act is currently covered by the Export Administration Act of 1969, 50 U.S.C. App. § 2401 (1970).

[70] 15 C.F.R. § 379.8(d) (1976), provides that

> [t]he Customs Officer is authorized to inspect and search any exporting carrier

court observed that although this regulatory scheme applies mainly to firearms, it also may be applied to other items attempted to be illegally exported from the United States.[72] Although the *Marti* court found sufficient probable cause to justify the challenged search[73] and therefore did not reach the precise question, it did indicate that the statute's supplemental enforcement provision could reasonably be interpreted to authorize an export search without probable cause.[74] Finally, the Drug Abuse Prevention and Control Act[75] may also provide some justification for warrantless searches of outgoing vehicles or vessels. Although intended in part to prohibit both the exportation and importation of drugs subject to abuse,[76] this legislation has been interpreted to embody a congressional intent to regulate "the transportation, receipt, . . . sale, purchase, . . . concealment and in any manner, the facilitation of the transportation and concealment of any narcotic drug."[77]

In the instant case, the majority found that since insufficient evidence was presented linking the defendants' vessel to the pier where the marijuana was found, there was no probable cause to support a warrantless search of the vessel.[78] However, the court held that the search could be sustained without probable cause under 19 U.S.C. § 1581 if the facts established that it was conducted at the border or its functional equivalent.[79] In resolving this question, the court reasoned that since the search of the defendants' ship had occurred in customs waters after it had crossed the three-mile limit, and since there was a reasonable certainty that the contraband found on board at the time of the search was on board when the border was crossed, the search could be upheld as occurring at the functional equivalent of the border and, therefore, probable cause to search was not required.[80] Futhermore, the court reasoned that since the same justifica-

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> at any time to determine whether commodities . . . are intended to be, or are being, exported or removed from the United States contrary to the Export Administration Regulations.

[71] 321 F. Supp. 59 (E.D.N.Y. 1970).

[72] *Id.* at 63.

[73] *Id.* at 66.

[74] *Id.* at 64. The court noted that "[s]ubdivision (d) of Regulation 379.8 uses no . . . limiting language and it might be interpreted as justifying an exit search even without probable cause." *Id., citing* United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968), *cert. denied,* 393 U.S. 1121 (1969).

[75] 21 U.S.C. § 955 (1970) provides that

> [i]t shall be unlawful for any person to bring or possess on board any vessel . . . arriving in or departing from the United States or the customs territory of the United States, a controlled substance . . . or a narcotic drug . . . unless such substance or drug is a part of the cargo entered in the manifest or part of [its] official supplies.

[76] H.R. REP. No. 1444, 91st Cong., 2d Sess. 4 (1970), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4566.

[77] United States v. Tonarelli, 336 F. Supp. 1084, 1086 (D.P.R. 1971).

[78] United States v. Stanley, 545 F.2d 661, 664 (9th Cir. 1976). Judge Kilkenny, specially concurring, believed that there was sufficient probable cause for the search. *Id.* at 667.

[79] *Id.* at 665. The court stated that the three-mile limit could qualify as a border for purposes of a customs search. *Id.* at 666 n.6.

[80] *Id.* at 667.

tions exist for searching persons entering the country as for those leaving the country,[81] a border search is valid regardless of whether the illegal material is being brought in or taken out of the country.[82]

The court considered its holding in the instant case as an extension of the existing law governing border searches.[83] This extension was justified by the court through an analysis of the policies surrounding the border search concept.[84] Upon closer scrutiny, however, the *Stanley* decision proves to be less of a departure from prior law than the court believed. For example, both 19 U.S.C. § 482 and § 1581 have been construed as applicable to vessels which are not inbound.[85] Additionally, two statutes which specifically refer to material being removed from the country could have been applied in the context of a *Stanley*-type search.[86] Thus, when combined with the court's earlier decision in *United States v. Gonzalez-Rodriquez,*[87] *Stanley*'s application of border search principles to outgoing vessels might have been better supported by reliance upon these more concrete statutory provisions rather than a mere comparison of the competing policies surrounding the search concept. Furthermore, since the court determined that no probable cause existed, the search could have been justified under *Almeida-Sanchez* only if it occured at the border or the functional equivalent of the border.[88] This was a critical issue in *Stanley* which, unfortunately, the court simply glossed over in order to reach its discussion of public policy. In citing its previous decision in *United States v. Solmes,*[89] however, the court seems to have carried over into the instant case its *Solmes* holding that a search of a vessel in a bay adjacent to the ocean will be deemed to have taken place at the functional equivalent of the border if the vessel had crossed the three-mile limit.[90] This construction of a functionally equivalent border would permit border searches of vessels or persons coming from international waters when they dock in the United States and thus seems to be in line with the examples given in *Almeida-Sanchez.*[91] Unlike *Solmes,* however, the vessel in the instant case had crossed the border and was proceeding in international waters over six miles from the border. This seems more akin to the situation in *Carroll* where the Supreme Court instructed that once a person crosses the border he has a right to free and uninterrupted passage unless probable cause to search him is shown.[92] Similarly, in another of its earlier decisions, the *Stanley* court had listed several factors to be considered in determining the functional equivalent of a border.[93] This test does not appear to have been met in the instant case since there was no surveillance of the defendants' ship after it crossed the border and since it could not be ascertained that virtually every vessel passing the point of search had recently crossed the border. Although these criteria were formulated in an inland search case, there is no reason to differentiate between land searches and those occurring at sea. Indeed, in testing the validity of searches of vessels at sea, the court had previously applied the very criteria it applies to inland customs searches.[94] The *Stanley* court disregarded these standards and relied instead on the test formulated in *Alexander.*[95] The *Alexander* test, however, is clearly suspect in light of the Supreme Court's pronouncement in *Almeida-Sanchez*[96] since a search could meet the *Alexander* test and still violate the *Almeida-Sanchez* restrictions.[97] In fact, the search in the instant case seemingly approximates the type of roving search away from the border specifically outlawed in *Almeida-Sanchez.*[98] Moreover, the situs of the search in *Stanley* does not qualify as the functional equivalent of the border under the guidelines promulgated by the Supreme Court in *Ortiz.*[99]

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[81] The court noted several similarities:

> (1) the government is interested in protecting some interest of United States citizens, such as restriction of illicit international drug trade; (2) there is a likelihood of smuggling attempts at the border; (3) there is difficulty in detecting drug smuggling; (4) the individual is on notice that his privacy may be invaded when he crosses the border; and (5) he will be searched only because of his membership in a morally neutral class.

Id. Additionally, the court explained that persons crossing the border are a "morally neutral class" since they are on notice that a search may be made and any search made lacks "the quality of insult felt by one singled out for a search." *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*; *see* note 81 *supra.*

[85] *See* notes 64 through 68 and accompanying text *supra.*

[86] *See* notes 69 through 77 and accompanying text *supra.*

[87] 513 F.2d 928 (9th Cir. 1975); *see* note 56 *supra. See also* Maul v. United States, 274 U.S. 501, 505 (1927) (border searches are not restricted to inbound vessels).

[88] *See* notes 41 through 46 and accompanying text *supra.*

[89] 527 F.2d 1370 (9th Cir. 1975).

[90] 545 F.2d at 667, *citing* United States v. Solmes, 527 F.2d 1370, 1372 (9th Cir. 1975).

[91] *See* note 46 *supra.*

Thus, when the totality of the circumstances and the relevant law are considered, the Ninth Circuit's decision in *Stanley* appears to be a retreat to the pre-*Almeida-Sanchez* authorities under which extended border searches were permitted without probable cause. In light of its recent opinions, it is doubtful that the Supreme Court will sanction such a withdrawal.

Phil B. Abernethy

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[92] *See* note 20 and accompanying text *supra.*

[93] United States v. Bowen, 500 F.2d 960, 965-66 (9th Cir.), *aff'd sub nom.*, United States v. Ortiz, 422 U.S. 891 (1975); *see* note 52 *supra.*

[94] The court revealed its intention in *Tilton* and *Solmes* to treat land and sea searches the same by holding that the *Almeida-Sanchez* restrictions, which were announced in the context of an inland search, apply as well to searches conducted at sea. *See* notes 53 through 55 and accompanying text *supra.*

[95] *See* notes 27 & 28 and accompanying text *supra.*

[96] *See* notes 45 & 46 and accompanying text *supra.*

[97] *E.g.,* Castillo-Garcia v. United States, 424 F.2d 482 (9th Cir. 1970); *see* note 29 *supra.* The search in *Castillo-Garcia,* which took place 105 miles beyond and seven hours after the defendant had crossed the border, was upheld under the *Alexander* test. Under *Almeida-Sanchez,* however, such a search would clearly be illegal because of the unreasonable distance from the border at which the search occurred. *See* note 46 and accompanying text *supra.*

[98] *See* notes 41 through 44 and accompanying text *supra.*

[99] *See* note 51 *supra.*

ANTITRUST LAW—SHAM EXCEPTION—EXCLUSIVE EXERCISE OF FIRST AMENDMENT RIGHTS, WITHOUT REGARD TO INTENT OR MANNER, NOT VIOLATIVE OF THE SHERMAN ACT

The Franchise Realty Interstate Corporation[1] brought an action[2] under section 1 of the Sherman Act[3] against two associations of restaurant and hotel employers and a labor union[4] arising out of the defendants' opposition[5] to the granting of certain construction permits by a city board.[6] In 1971, the San Francisco Department of Public Works[7] granted licenses to the plaintiffs for the operation of three restaurants.[8] However, following the defendants' acts of opposition, the San Francisco Board of Permit Appeals overruled the issuance of the permits.[9] The plaintiffs contended that the defendants had interfered directly with the business activities and relationships of a competitor by combining and conspiring, in violation of section 1 of the Sherman Act, to oppose repeatedly, baselessly and in bad faith the granting of building permits for the construction of its restaurants.[10] The United States District Court for the Northern District of California dismissed the plaintiffs' first amended complaint without leave to amend[11] and denied plaintiffs' motion for leave to file a second amended complaint.[12] On appeal to the United States Court of Appeals for the Ninth Circuit, *held*, affirmed. Where the activities of a party consist solely of an exercise of first amendment rights, no action will lie under the Sherman Act regardless of the conduct or intent of the party. Procedurally, where any action, either for damages or injunctive relief, involves conduct which is prima facie protected by the first amendment, more specific pleadings than would otherwise be required are necessary. *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 1571 (1977).

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[1] The plaintiffs-appellants consisted of the Franchise Realty Interstate Corporation and McDonald's Systems of California, Inc., subsidiaries of a nationwide restaurant chain. Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd., 542 F.2d 1076, 1078 (9th Cir. 1976), *cert. denied,* 97 S.Ct. 1571 (1977).

[2] Plaintiffs' complaint requested damages totalling $11 million. 542 F.2d at 1086.

[3] 15 U.S.C. § 1 (1970) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal. Every person who shall make any [such] contract or engage in any [such] combination or conspiracy . . . shall be deemed guilty of a felony.

[4] The defendants-appellees were designated as San Francisco Local Joint Executive Board of Culinary Workers, *et al.* 542 F.2d at 1076.

[5] On three separate occasions, the defendants had appeared before the San Francisco Board of Permit Appeals to voice their opposition to the permits granted to McDonald's. During these sessions, the defendants threatened to withdraw political support from those Board members who did not vote to revoke the permits. *Id.* at 1078.

[6] *Id.* The functions, powers and duties of the Board of Permit Appeals were defined by section 3.651 of the Charter of the City and County of San Francisco. The Board apparently possessed the authority to deny a permit whenever in its judgment issuance would adversely affect personal interests, property rights or the general public interest. *Id.* at 1079.

[7] *Id.*

[8] *Id.* at 1078. At the time suit was instituted, McDonald's was already operating two resturants in the San Francisco metropolitan area. *Id.*

[9] *Id.*

[10] *Id.* Specifically, the complaint alleged that

> [the defendants'] opposition was sham and frivolous in that by such opposition the defendants intended to and did no more than cover up a plan to foreclose the Company from free and unlimited access to the Department of Public Works and the Board of Permit Appeals . . . and thereby interfere directly with the business activities and relationships of a competitor.

Id. The complaint further alleged that the defendants knew their acts were a "sham and frivolous." *Id.*

Although antitrust litigation has some roots in the common law,[13] the first significant antitrust development in the United States occurred in 1890[14] with the passage of the Sherman Act.[15] Through its passage, Congress intended merely to codify the common law in the field of antitrust.[16] The Sherman Act alone, however, proved to be an inadequate vehicle for effectuation of congressional intent and, consequently, was supplemented in 1914 by the Clayton Act[17] and the Federal Trade Commission Act.[18] Together, these enactments provide the basic statutory framework for all antitrust litigation. Despite the comprehensive coverage of the antitrust acts, the broad language contained therein has necessitated repeated efforts to define more specifically the scope of coverage intended. This task has been accomplished both by legislative action in the form of direct exemption[19] and, of course, by judicial interpretation.[20] One of the most significant judicial exemptions was announced by the Supreme Court in the 1943 case of *Parker v. Brown.*[21] In *Parker,* a California producer and packer of raisins brought suit to enjoin enforcement of the California Agricultural Prorate Act,[22] which allegedly violated sections 1 and 2 of the Sherman Act.[23] The Court found no support for the plaintiff's contention either in the language of the Act or in its legislative history.[24] In the absence of any indication that Congress intended for the Act to extend to the situation before them, the Court concluded that the Act "must be taken to be a prohibition of individual and not state action."[25] The "state action" question, of course, has subsequently been litigated in a variety of different contexts.[26]

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[11] *Id.* In dismissing the action, the court relied on FED. R. CIV. P. 12(b)(6), which states in pertinent part:

> Every defense, in law or fact, to be a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (6) failure to state a claim upon which relief can be granted. . . .

The rule also provides that if its provisions are asserted, the motion should be treated as one for summary judgment, bringing into consideration FED. R. CIV. P. 56. Rule 56 details the procedures involved in a summary judgment proceeding, *i.e.* a method for promptly disposing of actions in which there is no genuine issue of material fact.

[12] 542 F.2d at 1076. In denying the motion, the court relied on FED. R. CIV. P. 15(a) and 60(b)(6). Rule 15(a) provides that a pleading may be amended once as a matter of course at any time before a responsive pleading is served. Otherwise, a pleading may be amended only by leave of the court or by written consent of the adverse party. Rule 60(b)(6) states that the court may relieve a party from a final judgment, order or proceeding for any reason justifying relief from the operation of the judgment.

[13] In the first noted decision in this area, Dyer's Case, Y.B. Pasch. 2 Hen. V, f.5, pl. 26 (1415), *quoted in* M. HANDLER, H. BLAKE, R. PITOFSKY, & H. GOLDSCHMID, CASES AND MATERIALS ON TRADE REGULATION 41 (1975), the court angrily rebuked an attempted collection on a bond for John Dyer's breach of his agreement not to "use his art of a dyer's craft within the town . . . for half a year."

[14] The first antitrust legislation, which failed to gain congressional approval, was brought to the floor of Congress by Senator John Sherman in 1888. Although the final version was largely the work of the Senate Judiciary Committee, it bore Senator Sherman's name as a matter of courtesy. Letvin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 255 (1956).

[15] Act of July 2, 1890, Pub. L. No. 51-647, 26 Stat. 209 (codified at 15 U.S.C. §§ 1-7 (1970 & Supp. V 1975)).

[16] Senator Sherman assured the Congress that the Act "[did] not announce a new principle of law, but [applied] old and well recognized principles of the common law." 21 CONG. REC. 2456 (1890) (remarks of Senator Sherman).

[17] Act of October 15, 1974, Pub. L. No. 63-323, 38 Stat. 730, (codified at 15 U.S.C. §§ 12-27 (1970 & Supp. V 1975)).

[18] Act of September 26, 1914, Pub. L. No. 63-311, 38 Stat. 717 (codified at 15 U.S.C. §§ 41-58 (1970 & Supp. V 1975)).

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[19] 15 U.S.C. § 18 specifically exempts

> transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission, . . . the United States Maritime Commission, or The Secretary of Agriculture . . . .

[20] The judicially created exemptions from antitrust liability can be traced to the landmark decision of Standard Oil Co. v. United States, 221 U.S. 1 (1911). In *Standard Oil,* the government brought suit under section 4 of the Sherman Act against Standard Oil of New Jersey and 70 other corporate defendants charging them with conspiracy to monopolize and restrain domestic and foreign trade in crude oil, refined oil and other petroleum products. *Id.* at 31. Writing for the majority, Mr. Justice White stated, without listing any specific exemptions, that sections 1 and 2 of the Sherman Act proscribed only "undue" or "unreasonable" restraints of trade. *Id.* at 59-60.

For other decisions restricting the otherwise broad coverage of the antitrust laws, *see, e.g.,* Flood v. Kuhn, 407 U.S. 258, 284 (1972) (professional baseball exempt from antitrust laws); Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963) (national stock exchange exempt to extent necessary to effectuate federal securities law); United States v. Rock Royal Coop., Inc., 307 U.S. 553, 560 (1939) (exempting order issued by Secretary of Agriculture).

[21] 317 U.S. 341 (1943).

[22] Under the authority of this legislation, a seasonal prorating marketing program was developed and implemented by a "program committee." *Id.* at 347. The plan required every raisin grower in a specified area to deliver his harvest to a receiving station where it was graded on a sliding scale of quality. *Id.* at 347-48. As a result, the grower was able to market only 30% of his raisin crop. *Id.* at 348.

[23] *Id.* at 344.

[24] *Id.* at 350-51.

[25] *Id.* at 352. The Court noted, however, that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351 (citation omitted). For a discussion of the "state action" doctrine, see Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine,* 76 COLUM. L. REV. 1 (1976); Jacobs, *State Regulation and the Federal Antitrust Laws,* 25 CASE W. RES. L. REV. 221 (1975); Simmons & Fornaciari, *State Regulation as an Antitrust Defense: An Analysis of the* Parker v. Brown *Doctrine,* 43 U. CINN. L. REV. 61 (1974); Teply, *Antitrust Immunity of State and Local Government Action,* 48 TUL. L. REV. 272

A corollary to the principle advanced in *Parker* was announced by the Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[27] The complaint in *Noerr*, arising from a " 'no-holds-barred fight' " between the railroad and trucking industries,[28] charged the defendants with conspiring to restrain trade in and monopolize the long-distance freight business in violation of sections 1 and 2 of the Sherman Act.[29] Specifically, the plaintiffs charged that the defendants had conducted a publicity campaign designed to dissuade the passage of favorable legislation and impair the relationship between the plaintiffs and their customers.[30] Analogizing the instant case to its prior decisions in *Standard Oil Co. v. United States,*[31] *United States v. Royal Rock Cooperative, Inc.*[32] and *Parker v. Brown,*[33] the Court held that concerted attempts by two or

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(1974); Comment, *Of Raisins and Regulations: The Revitalization of* Parker v. Brown, 10 Wake Forest L. Rev. 567 (1974); Note, *State Action Exemption from the Antitrust Laws,* 50 B.U.L. Rev. 393 (1970).

[26] *Exclusive licenses or franchises: See, e.g.,* Hecht v. Pro Football, Inc., 444 F.2d 931, 935 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972) (restrictive covenant in lease between District of Columbia Armory Board and Washington Redskins was, without a specific exemption by Congress, subject to antitrust scrutiny). See Comment, Parker v. Brown *Gone to Hecht: A New Test for State Action Exemptions,* 24 Hastings L.J. 287, 295-96 (1973). *Government building specifications: See, e.g.,* George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 31 (1st Cir.), *cert. denied,* 400 U.S. 850 (1970) (government adoption of specifications not an action which would result in private antitrust immunity). See Comment, Whitten v. Paddock: *The Sherman Act and the "Government Action" Immunity Reconsidered,* 71 Colum. L. Rev. 140, 142 (1971). *Governmentally-mandated conduct: See, e.g.,* Alabama Power Co. v. Alabama Elec. Coop., 394 F.2d 672, 677 (5th Cir.), *cert. denied,* 393 U.S. 1000 (1968) (where borrower is required to agree to long term, all requirements contracts with electric distribution cooperatives as condition of loan, both borrower and administrator are immune from antitrust action). See Comment, Alabama Power Co. v. Alabama Electric Co-operative: *Rural Electrification and the Antitrust Laws—Irresistible Force Meets Immovable Object,* 55 Va. L. Rev. 325, 326 (1969). *Governmental commercial activities: See, e.g.,* New Mexico v. American Petrofina, Inc., 501 F.2d 363, 372 (9th Cir. 1974) (*Parker* held applicable to state efforts to fix prices and eliminate competition among political subdivisions in the purchase of asphalt for construction, repair and maintenance of public highways). See 88 Harv. L. Rev. 1021, 1022 (1975).

[27] 365 U.S. 127 (1961).

[28] *Id.* at 144 (footnote omitted). This litigation was initiated when a group of 41 separate long-distance trucking companies and their trade association, the Pennsylvania Motor Truck Association, brought an action against an association of 24 railroads, the Eastern Railroad Presidents Conference and a public relations agency retained by the Conference. *Id.* at 129. The respective parties had battled for a number of years as competing carriers of freight in Pennsylvania. *Id.* at 129-30.

[29] *Id.* at 129. The complaint sought treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15 (1970), and an injunction restraining future acts pursuant to the alleged conspiracy. 365 U.S. at 130.

[30] *Id.* at 129. Of particular importance to the plaintiffs was the fact that the defendants had persuaded the Governor of Pennsylvania to veto legislation which would have increased maximum weight limits applicable to the trucking industry. *Id.* at 130.

[31] 221 U.S. 1 (1911); *see* note 20 *supra.*

[32] 307 U.S. 533 (1939); *see* note 20 *supra.*

[33] 317 U.S. 341 (1943); see notes 21 through 25 and accompanying text *supra.*

more persons to influence legislative or executive action are not subject to Sherman Act prohibitions even though the governmental action sought would entail a restraint of trade.[34] Such an immunity was thought to be justified on two distinct grounds.[35] First, since actions by the state are immune from antitrust strictures, regulating joint efforts to influence governmental action would be tantamount to regulating political activity, a purpose with no basis in the legislative history of the Act.[36] Second, the regulation of such activities would deprive persons of their fundamental first amendment right to petition the government.[37] In so ruling, however, the Court did note that there may be instances where action "ostensibily directed toward influencing governmental action . . . is a mere sham to cover . . . nothing more than an attempt to interfere directly with the business relationships of a competitor."[38] In such a situation, the Court concluded that the antitrust laws could justifiably be invoked.[39] Four years later, in *United Mine Workers v. Pennington,*[40] the Supreme Court expanded the principles announced in *Noerr.* Seeking a minimum wage for employees of companies selling coal to the TVA, the cross-defendants[41] in *Pennington* were alleged to have successfully approached the Secretary of Labor and to have urged TVA to curtail spot-market purchases of coal.[42] In granting antitrust immunity to the challenged conduct, the Court interpreted *Noerr* as a shield for any "concerted effort to influence *public officials* regardless of intent or purpose."[43]

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[34] 365 U.S. at 135-36. The Court stated that such a rule applied "at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." *Id.* at 138. In so ruling, the Court disagreed with the district court's conclusion that the antitrust laws could apply because: (1) the railroad's "sole purpose" behind the publicity compaign was to destroy the truckers' business; (2) the railroads employed the "third-party technique" of advertising, *i.e.* circulating propoganda that appeared to be the spontaneous declarations of disinterested groups; or (3) the railroads intended to hurt the truckers even if they failed to influence any legislation. *Id.* at 138-43.

[35] In establishing this immunity, the Court noted the "essential dissimilarity" between joint efforts to influence legislation or law enforcement and the typical antitrust violation. *Id.* at 136.

[36] *Id.* at 137.

[37] *Id.* at 137-38.

[38] *Id.* at 144. The Court found this exception inapplicable to the case at bar because the defendant's efforts had been "genuine" and "highly successful." *Id.*

[39] *Id.* For more extensive treatments of *Noerr*, see Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense,* 66 MICH. L. REV. 333 (1967); Walden, *More About Noerr—Lobbying, Antitrust and the Right to Petition,* 14 U.C.L.A.L. REV. 1211 (1967); Comment, *Antitrust Immunity: Recent Exceptions to the Noerr-Pennington Defense*, 12 B.C. IND. & COM. L. REV. 1133 (1971); 47 CORNELL L.Q. 250 (1962).

[40] 381 U.S. 657 (1965).

[41] The litigation began as a suit by the United Mine Workers of America Welfare and Retirement Fund against the owners of a partnership, Phillips Brothers Coal Company, to recover certain royalty payments. *Id.* at 659. The antitrust issues arose in the context of a crossclaim against the trustees of the Welfare and Retirement Fund, the United Mine Workers and certain large coal producers, alleging violations of sections 1 and 2 of the Sherman Act. *Id.*

[42] *Id.* at 660-61.

[43] *Id.* at 670 (emphasis added). The majority stated that

> [j]oint efforts to influence public officials do not violate the antitrust laws even

The so-called "sham" exception to the *Noerr-Pennington* immunity was first applied by the Supreme Court in *California Motor Transport Co. v. Trucking Unlimited.*[44] In *Trucking Unlimited*, the plaintiffs'[45] complaint had alleged that the defendants had jointly financed and pursued a consistent, systematic and uninterrupted program of opposition[46] to every application made by the plaintiffs for the grant, registration or transfer of operating rights before the Interstate Commerce Commission and the California Public Utilities Commission.[47] Such actions were allegedly intended to put the plaintiffs and other

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> though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

Id. at 670. The Court's use of the term "public official" was a clear expansion of the *Noerr* decision, which had referred only to executive or legislative action. *See* text accompanying note 34 *supra.*

In the years following *Pennington,* the lower courts displayed some hesitancy to apply the *Noerr-Pennington* doctrine in various contexts. *E.g.*, (1) *Influencing government as a consumer:* George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 (1st Cir. 1969), *cert. denied,* 400 U.S. 850 (1970) (*Noerr* inapplicable to efforts to influence public officials acting under competitive bid statutes to adopt restrictive specifications advantageous to defendants). *But see* United States v. Johns-Manville Corp., 259 F. Supp. 440, 452-53 (E.D. Pa. 1966) (concerted action to influence decision of public officials on pipe specifications in order to restrict foreign competition held constitutionally protected under *Noerr-Pennington*). *See generally* 81 HARV. L. REV. 847 (1968). (2) *Use of coercion:* Sacramento Coca-Cola Bottling Co. v. Teamsters Local 150, 440 F.2d 1096, 1099 (9th Cir.), *cert. denied,* 404 U.S. 826 (1971) (*Noerr* held inapplicable to coercive methods used by union to induce California State Fair officials to ban sale of Coca-Cola at fairgrounds). (3) *Use of false or misleading data:* Woods Exploration & Prod. Co. v. Aluminum Co. of America, 438 F.2d 1286, 1298 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972) (*Noerr* held inapplicable to filing of false nomination forecasts with Texas Railroad Commission). *See generally* 46 TUL. L. REV. 526 (1972). (4) *Conspiracy involving public officials:* Harman v. Valley Nat'l Bank, 339 F.2d 564, 566 (9th Cir. 1964) (joint efforts to influence administrative officials for anticompetitive purpose inapplicable under *Noerr* where public official is a participating member of the conspiracy). *See generally* 6 B.C. IND. & COM. L. REV. 928 (1965). (5) *Influencing foreign governments:* Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 107-08 (C.D. Cal. 1971), *aff'd per curiam,* 461 F.2d 1261 (9th Cir.), *cert. denied,* 409 U.S. 950 (1972) (*Noerr* inapplicable to attempts to influence foreign governments). *See generally* 3 RUT.-CAM. L.J. 544 (1972).

[41] 404 U.S. 508 (1972). Law review commentary on this case has been prolific. *See, e.g.,* Oppenheim, *Antitrust Immunity for Joint Efforts to Influence Adjudication Before Administrative Agencies and Courts—From* Noerr-Pennington *to* Trucking Unlimited, 29 WASH. & LEE L. REV. 209 (1972); Comment, *Lobbying Before Licensing Agencies: Noerr-Pennington Re-Assessed,* 51 B.U.L. REV. 90 (1971); 24 BAYLOR L. REV. 265 (1972); 76 DICK. L. REV. 593 (1972); 13 DUQ. U.L. REV. 145 (1974); 26 SW. L.J. 926 (1972); 25 VAND. L. REV. 641 (1972).

[45] The dispute in this case was between competing highway carriers operating throughout California. 404 U.S. at 509.

[46] The defendants allegedly established a trust fund to finance and publicize their opposition. 404 U.S. at 518 (Stewart, J., concurring).

[47] *Id.* Specifically, the defendants were alleged to have initiated both state and federal proceedings to defeat the plaintiffs' applications to acquire operating rights. Such activities extended to rehearings and to appeals from agency or court decisions on the applications. *Id.* at 509.

competitors out of business and monopolize the highway common carriage business.[48] Relying upon the sham exception created in *Noerr*, the Court held that the allegations advanced, if proved, were actionable under the antitrust laws.[49] In addition to recognizing the applicability of the sham exception, the Court's decision in *Trucking Unlimited* established two important principles. First, efforts to influence adjudicatory bodies, whether judicial or administrative in nature, are also shielded from antitrust liability by the *Noerr-Pennington* doctrine.[50] Second, despite that immunity, a pattern of baseless, repetitive claims which abuses the judicial and administrative processes, and which effectively bars another party's access to those forums cannot find protection under *Noerr*.[51] Although the Court determined that the sham exception was applicable in *Trucking Unlimited*, neither that case nor subsequent litigation has yielded a uniform test for determining when the exception should be applied. Since no mention was made in *Trucking Unlimited* of attempts to influence legislative processes, the parameters of this aspect of the exception presumably remain defined only by the original language of *Noerr*.[52]

Since the decision in *Trucking Unlimited,* the lower courts have attempted to clarify the meaning of the sham exception, focusing primarily upon two aspects of a defendant's conduct—his true intent and his use of unethical tactics.[53] Thus, the courts have stressed the fact that even though a party may employ legal methods to advance his position, the Sherman Act could still find application if his purpose or intent is unlawful.[54] Other courts have gone even further in finding antitrust liability predicated upon unlawful or abusive acts without regard to intent.[55] And, in several cases, the courts apparently have recognized both the defendant's true intent and his unethical tactics in determining the sham exception's relevance.[56] Despite the existence of these varied approaches, the Supreme Court has provided precious little guidance, considering the question only in *Otter Tail Power Co. v. United States.*[57] The government brought suit against the Otter Tail Power Company for allegedly using the judicial process[58] to prevent various towns from constructing their own power plants to compete with the defendant for electrical services.[59] On remand from the Supreme Court,[60] the trial court held that Otter Tail's repetitive use of litigation was motivated by a desire to preserve its domination of the market and that such action fell within the sham exception to *Noerr* as defined in *Trucking Unlimited.*[61] The court relied upon the intent of the defendants as the

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[48] *Id.* at 511.

[49] *Id.* at 515-16.

[50] *Id.* at 510. The court stated:

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors.

Id. at 510-11.

[51] *Id.* at 513. The Court noted that while the defendants had a right, protected by the first amendment, to approach the appropriate agencies and courts and be heard on its competitors' applications, the first amendment did not immunize violations of a valid statute nor could that amendment be used as a pretext for achieving " 'substantive evils.' " *Id.* at 513-15 (citations omitted).

[52] Jones, *Trade Regulation: Noerr Antitrust Immunity—Defining the Sham Exception,* 29 OKLA. L. REV. 512, 515 (1976).

[53] *Id.* at 516. See notes 54 and 55 *infra.*

[54] *E.g.,* Israel v. Baxter Laboratories, Inc., 466 F.2d 272, 278 (D.C. Cir. 1972) (conspiracy to influence FDA to deny fair consideration of plaintiff's new drug applications); United States Dental Inst. v. American Ass'n of Orthodontists, 396 F. Supp. 565, 583 (N.D. Ill. 1975) (efforts to restrict number of orthodontists by blocking certification of dental school); Cow Palace, Ltd. v. Associated Milk Producers, Inc., 390 F. Supp. 696, 704 (D. Colo. 1975) (illegal campaign contributions and bribes paid to freeze minimum price level of milk); Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 349 F. Supp. 1064, 1068 (D. Hawaii 1972), *aff'd,* 489 F.2d 203 (9th Cir. 1973), *cert. denied,* 417 U.S. 913 (1974) (opposing subsidy request before CAB in attempt to monopolize interisland air transportation system); Sierra Club v. Butz, 349 F. Supp. 934, 939 (N.D. Cal. 1972) (administrative appeals and complaints to persuade government to reduce timber sales and preserve land as wilderness area). In *Aloha Airlines,* the court reasoned that

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> [i]f plaintiff can prove that [the defendant] opposed its subsidy with "the predatory intent and purpose of eliminating plaintiff as a viable competitor" . . . and "with full knowledge of its impact on plaintiff and with the intent of injuring or destroying plaintiff, . . ." then the *Noerr* protections do not apply.

349 F. Supp. at 1068 (citations omitted).

[55] *E.g.*, Semke v. Enid Auto Dealers Ass'n, 456 F.2d 1361, 1366 (10th Cir. 1972) (in context of attempt to persuade state motor vehicle officials to enjoin sale of plaintiff's cars, "sham" construed to mean "misuse or corruption of the legal process"); Associated Radio Serv. Co. v. Page Airways, Inc., 414 F. Supp. 1088, 1096 (N.D. Tex. 1976) (institution of legal proceedings amounting to abuse of process in attempt to control resale of avionic equipment used on private aircraft); Bethlehem Plaza v. Campbell, 403 F. Supp. 966, 971 (E.D. Penn. 1975) (spurious litigation and advertising to prevent expenditure of public funds to finance garage necessary for development of shopping mall). *See generally* Comment, *Limiting the Antitrust Immunity to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 HARV. L. REV. 715 (1974).

[56] *E.g.*, Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 228 (7th Cir. 1975) (campaign contributions and publicity employed to prevent city council grant of television franchise); Rodgers v. FTC, 492 F.2d 228, 231 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974) (communications to defeat "anti-litter" measure which would have prohibited sale of beverage in certain containers).

[57] 410 U.S. 366 (1973), *aff'g in part, vacating and remanding in part* 331 F. Supp. 451 (D. Minn. 1971). For commentary on the ramifications of the *Otter Tail* decision, *see generally* Hale & Hale, *The* Otter Tail Power *Case: Regulation by Commission or Antitrust Laws*, 1973 SUP. CT. REV. 99; Note, *Refusals to Deal by Vertically Integrated Monopolists*, 87 HARV. L. REV. 1720 (1974); Comment, Otter Tail *and its Import for Regulated Utilities*, 9 WAKE FOREST L. REV. 407 (1973); 23 DRAKE L. REV. 182 (1973); 2 PEPPERDINE L. REV. 190 (1974); 5 SETON HALL L. REV. 92 (1973); 47 TEMP. L.Q. 370 (1974).

[58] The defendant's actions consisted of filing numerous suits against various towns and their officials each time one of the towns issued revenue bonds for the purpose of providing construction costs for a power plant. The suits successfully discredited the towns' bonds and either delayed, prevented or interfered with construction. 410 U.S. at 369.

[59] *Id.*

[60] The trial court had held that the *Noerr-Pennington* immunity was inapplicable to adjudicative proceedings and ruled for the government. 321 F. Supp. 54 (D. Minn. 1971). The Supreme Court, however, remanded for reconsideration in light of the ruling in *Trucking Unlimited* that the *Noerr-Pennington* doctrine applied not only to executive and legislative action but also to adjudicative proceedings. 410 U.S. 366, 380 (1973).

[61] 360 F. Supp. 451, 452 (D. Minn. 1973), *aff'd mem.*, 417 U.S. 901 (1974).

basis for finding that the sham exception controlled in the context of judicial proceedings to influence governmental action.[62] Unfortunately, the Supreme Court affirmed without opinion,[63] leaving the precise boundaries of the sham exception still undefined.

Procedurally, the standard for pleadings submitted in a federal court action is contained in Rule 8(a) of the Federal Rules of Civil Procedure.[64] If a complaint does not conform to these standards, it is subject to dismissal under Rule 12(b)(6).[65] These rules apply to all federal civil proceedings and there is nothing in the rules to indicate that the pleadings standard for antitrust actions is to receive different treatment.[66] Indeed, in *Walker Distributing Co. v. Lucky Lager Brewing Co.*,[67] the Ninth Circuit specifically rejected the notion that it is necessary to plead "facts" rather than "conclusions" in antitrust cases.[68]

In the instant decision, the court stated that since the defendants' actions consisted entirely of attempts to lobby and petition a governmental body,[69] and since such efforts are absolutely immune from antitrust liability,[70] the defendants' conduct did not constitute a Sherman Act violation.[71] Writing for the court, Judge Duniway reasoned that since the defendants had not engaged in a "publicity campaign," the *Noerr* "sham exception" was not applicable,[72] and that *Trucking Unlimited* was distinguishable on its facts.[73] With respect to the procedural issue raised, the court pointed out that in order for relief to be granted a complaint must contain allegations of specific illegal activities[74] which allegedly barred the plaintiff's access to a governmental body.[75] Further, since the plaintiff sought damages and injunctive relief based upon conduct prima facie protected by the first amendment, and since the mere pendency of the action would chill the exercise of first amendment rights, more specific allegations than would otherwise be required were necessary.[76]

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[62] *Id.*

[63] 417 U.S. 901 (1974).

[64] FED. R. CIV. P. 8(a) states:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

[65] 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1356, at 590 (1969). See note 11 *supra.*

[66] 5 C. WRIGHT & A. MILLER, *supra* note 65, at 149, 165.

[67] 323 F.2d 1 (9th Cir. 1963), *cert. denied,* 385 U.S. 976 (1966).

[68] 323 F.2d at 3-4. The court had stated that "[t]he fact Rule 9(b) requires particularity of statement of circumstances constituting fraud or mistakes indicates that such particularity is not required in other cases, including antitrust cases." *Id.* at 3 (citations omitted); *see* Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 472-73 (1962) (absence of conclusive factual assertions in affidavit excused since antitrust litigation depends largely on intent which would be brought out at trial); Nagler v. Admiral Corp., 248 F.2d 319, 323-24 (permissible to state claim in general terms). *But see* Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 214 F.2d 891, 894 (5th Cir. 1954), *cert. denied,* 348 U.S. 913 (1955) (must allege specific facts for treble damages under antitrust law); Davidson v. Kansas City Star Co., 202 F. Supp. 613, 615-16 (W.D. Mo. 1962), *rev'd on other grounds,* 336 F.2d 439 (8th Cir. 1964) (must plead with particularity conduct which violates antitrust laws). *See generally* Freund, *The Pleading and Pre-Trial of an Antitrust Claim,* 46 CORNELL L.Q. 555, 556-57 (1961).

[69] Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd., 542 F.2d 1076, 1080 (9th Cir. 1976), *cert. denied,* 97 S. Ct. 1571 (1977).

[70] 542 F.2d at 1080. The court noted that while *Noerr* and *Pennington* involved attempts to influence legislation and executive action, it was clear that the same principles are applicable to efforts to exert influence on administrative or judicial proceedings. *Id.* at 1080 n.3, *citing* California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972); *see* notes 44 through 51 and accompanying text *supra.*

[71] 542 F.2d at 1079.

In a lengthy dissent, Judge Browning argued that the court had erred by distorting the substantive rule concerning the sham exception to antitrust immunity[77] and by fashioning an unwarranted exception to the standard for pleading set forth in the Federal Rules of Civil Procedure.[78] Judge Browning reasoned

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[72] *Id.* at 1080-81; *see* text accompanying note 38 *supra.*

[73] 542 F.2d at 1081. The court reasoned that the *Trucking Unlimited* exception to *Noerr* did not apply because the plaintiffs' complaint failed to allege either that the defendants had conducted a publicity campaign, that their efforts were jointly financed or, most importantly, that the defendants had by communicating threats sought to deter McDonald's from filing permit applications. *Id.*

[74] Such activities would entail those activities not protected by *Noerr. Id.* at 1082.

[75] *Id.* The court recognized the fact that

> ordinarily the conclusory nature of the plaintiffs' allegation might warrant greater indulgence, for dismissal of a complaint is normally proper . . . only if "it appears beyond doubt that the plaintiff(s) can prove no set of facts in support of [their] claim which would entitle [them] to relief."

Id., quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957); *accord,* Corsican Prod. v. Pitchess, 338 F.2d 441, 442 (9th Cir. 1964). However, the court stated that this was not an ordinary case. 542 F.2d at 1082.

[76] 542 F.2d at 1082-83. Judge Duniway noted that the Supreme Court has consistently recognized the sensitivity of the first amendment guarantees to the threat of harassing litigation and has tried to safeguard those guarantees. *Id.* at 1082; *see* Time, Inc. v. Hill, 385 U.S. 374, 387-91 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 267-83 (1964); NAACP v. Button, 371 U.S. 415, 431-33 (1963).

In a concurring opinion, Chief Judge Markey of the United States Court of Customs and Patent Appeals, sitting by designation, stated that the instant case illustrated the effect of the "unhappy marriage of 'notice' pleading and virtually unlimited discovery"—a combination whose "might makes right" potential would be completely contrary to the intent behind the effort to free the pre-trial phase from formalism and surprise. 542 F.2d at 1086 (Markey, C.J., concurring).

[77]
> "A combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building one empire and destroying another. . . . If these facts are proved, a violation of the antitrust laws has been established."

Id. (Browning, J., dissenting), *quoting* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972).

[78] 542 F.2d at 1089 (Browning, J., dissenting). The dissent also noted that this procedural rule had been forcefully restated by the Supreme Court. *Id.* Indeed, the Court has stated that

> the Federal Rules of Civil Procedure do not require a claimant to set out in detail

that since conduct protected by the first amendment is not necessarily immune from suit under the antitrust laws,[79] and since the complaint in the instant case alleged conduct which *Trucking Unlimited* had held to be an antitrust violation,[80] the sham exception was controlling.[81] In discussing the procedural problem, the dissenting opinion noted that the court previously had specifically rejected the notion that it is necessary to plead facts rather than conclusions in antitrust cases[82] and that the court cited no authority to support its new rule.[83] Judge Browning concluded by stating that since the power to prescribe rules of civil procedure for the district courts was vested in the Supreme Court,[84] the court lacked the authority to impose what essentially were substantial revisions of those rules.[85]

The instant decision is an enigma in that both of its pronouncements seemingly ignore established precedents. The substantive ruling of the court does little to clarify the confusion surrounding the sham exception, but instead falls into a range of recent decisions interpreting the exception with reference to varying criteria.[86] To further confuse the issue, the decision focused neither on intent nor on the use of unethical tactics, but rather on the nature of the defendants' activities and whether those activities were protected by the first amendment.[87] It is submitted that the court's limitation of the sham exception to "publicity campaigns"[88] was overly restrictive and unnecessary. Further, the court's interpretation of *Trucking Unlimited* to immunize first amendment activity in the absence of other "external activities"[89] represents a clear limitation on that decision and *Otter Tail* since all first amendment activity would thereby

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> the facts upon which he bases his claim. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Conley v. Gibson, 355 U.S. 41, 47-48 (1957); *see* Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Bodine Produce, Inc. v. United Farm Workers Organizing Comm., 494 F.2d 541, 556 (1974).

[79] 542 F.2d at 1087 (Browning, J., dissenting).

[80] *Id.*

[81] *See id.* at 1088-89 & n.4. The dissent further stated that in reaffirming the *Trucking Unlimited* decision, the *Otter Tail* Court made no suggestion that any conduct external to the litigation was necessary to constitute an antitrust violation. Thus, Judge Browning advocated that abuse of the administrative process alone could constitute a violation of the Sherman Act when accompanied by the requisite intent. *Id.* at 1088.

[82] *Id.* at 1089.

[83] *Id.* at 1090.

[84] *See* 28 U.S.C. § 2072 (1972), which provides in part:

> The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

[85] 542 F.2d at 1090.

[86] See notes 54 through 56 and accompanying text *supra.*

[87] *See* 542 F.2d at 1080, 1087 (Browning, J., dissenting).

[88] *Id.* at 1080. While the language employed by the *Noerr* Court in announcing the sham exception specifically recognized situations in which publicity campaigns had been conducted, see 365 U.S. at 144, the *Noerr* decision should not be limited to its precise facts.

[89] 542 F.2d at 1081 n.4.

acquire *Noerr* immunity. Since the defendants' motives were clearly anticompetitive, a decision predicated instead upon the defendants' true intent would have served to further define the boundaries of the sham exception and probably would have altered the result. Should the rationale employed by the majority in determining the applicability of *Noerr* find universal acceptance, the courts would no longer need to examine the defendant's true motive or the manner in which the defendant conducted the offending activities. Rather, they would simply have to determine whether the defendant's conduct was constitutionally protected and whether a "publicity campaign" had been waged. Under such a limited examination, almost any activity protected by the first amendment, regardless of its nature or purpose, would be exempt from liability under the *Noerr-Pennington* teachings. The implications of such a principle are devastating. Businesses, organizations, unions and individuals would be free to wield their power much more forcefully than before by simply operating under the guise of the first amendment. Such an accordance of first amendment protection would severely contract the existing scope of *Noerr* and inhibit the enforceability of the antitrust laws. Further, protection of such conduct could lead to the anticompetitive domination of trade by big business and powerful interest groups, preventing the public from reaping the benefits of free competition.

The procedural rule announced by the court represents a substantial and unsupported modification of standard pleading requirements. Specific pleadings, although perhaps desirable, are certainly not demanded by the weight of authority in this area.[90] Should the logic expressed by Judge Duniway be adopted, it would have a tremendous effect not only in antitrust cases but also in any case involving first amendment rights. The result sought by the court could have been better achieved through an expansion of the pleading requirements for all antitrust actions. While the precedential support for such a ruling is also dubious, the result would not have been so much at variance with present authority as the court's requirement of specific pleadings in all cases involving first amendment activities.[91] Additionally, when viewed in light of the substantive ruling, the specific pleading requirement represents a further advantage for big business. Since the evidence in most antitrust cases is controlled by the offending party,[92] the absence of liberal pleading requirements and a liberal discovery policy make it even more difficult for a smaller independent entity to maintain an action against more powerful groups. Indeed, the court has created a "heads-I-win, tails-you-lose" situation. Larger, financially sound corporations and groups are authorized to maintain extensive campaigns, regardless of method or intent, which take advantage of the immunity protecting first amendment activity. Their smaller competitors, however, may lack the requisite resources to conduct the detailed investigations necessary to provide a factual basis for specific pleadings. Thus, even if a defendant's conduct exceeds the permissible limitations established, redress for the injured party may be unavailable save a resort to speculation and perhaps fabrication during the pleadings stage of the litigation. While the court's desire to protect good faith efforts to influence public officials is laudable, it is imperative that those who abuse the first amendment in attempting to interfere with the affairs of a competitor do not escape liability for such actions. Unfortunately, the court's opinion in the instant case will make it even easier to conduct predatory and anticompetitive activities under the banner of the first amendment.

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[90] *See* 5 C. Wright & A. Miller, *supra* note 65, § 1228 at 165.

[91] *See id.*

[92] Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473 (1962).

Thomas Webb Avent, Jr.

CONSTITUTIONAL LAW—DUE PROCESS—DEFENDANT NOT ENTITLED TO NEW TRIAL UNLESS EVIDENCE SUPPRESSED BY PROSECUTION PROBABLY WOULD HAVE RESULTED IN ACQUITTAL

Warren Garrison filed a federal habeas corpus petition[1] to vitiate his conviction in a state proceeding[2] in which the prosecutor failed to volunteer to the defense a police report that summarized an interview with the robbery victim.[3] At trial, the victim positively identified Garrison and vaguely indicated that Garrison fit a physical description he had previously given to investigating police officers.[4] Garrison's actual physical appearance was clearly inconsistent with the description contained in the report.[5] Since he was unaware of the report's existence, Garrison's trial counsel made no specific request for disclosure of this or any other favorable evidence.[6] In an unpublished opinion, the district court granted relief, finding that the prosecutor's failure to make a voluntary disclosure of evidence that could have been used to attack the credibility of the government's sole witness was a violation of due process.[7] On appeal to the United States Court of Appeals for the Fifth Circuit, *held,* reversed. Where a prosecutor has not voluntarily disclosed evidence useful only for impeachment purposes, and the defense has not specifically requested such evidence, a new trial will be granted only if the petitioner demonstrates that disclosure of the evidence probably would have resulted in an acquittal. *Garrison v. Maggio*, 540 F.2d 1271 (5th Cir. 1976), *cert. denied*, 97 S. Ct. 2655 (1977).

Any survey of the development of the prosecutorial duty to disclose evidence[8] must begin with the United States Supreme Court's 1935 decision in *Mooney v. Holohan.*[9] In *Mooney,* a convicted murderer sought habeas corpus relief alleging that his conviction had been obtained solely on the basis of evidence known by the prosecution to be perjured.[10] The Court, after reviewing the record, held that the "deliberate deception of court and jury by the presentation of [perjured] testimony" violated fundamental due process requirements.[11] Following *Mooney*, each Supreme Court decision in this area revolved around prosecutorial use of perjured testimony.[12] The lower courts, however, effectively expanded *Mooney* by ignoring the prosecutorial misconduct issue and emphasizing instead the question of whether the defendant had been afforded a fair trial.[13] The lower courts' focus on the harm to the defendant as a result of nondisclosure finally won Supreme Court approval in the landmark case of *Brady v. Maryland.*[14] In *Brady*, the petitioner and a companion, Boblit, were convicted of murder and sentenced to death. Despite pretrial requests by petitioner's counsel that he be permitted to review all extrajudicial statements by Boblit, the prosecutor withheld a statement in which Boblit admitted the actual homicide.[15] The Court, recognizing that it was expanding the *Mooney* ruling,[16] agreed that the suppression of the confession violated due process principles:

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[1] Although Garrison had exhausted his state remedies as to reversal, he did not seek resentencing. Garrison v. Maggio, 540 F.2d 1271, 1274 n.5 (5th Cir. 1976), *cert. denied*, 97 S. Ct. 2655 (1977); *see* 28 U.S.C. § 2254 (1970).

[2] In 1968, the state court sentenced Garrison to 99 years in prison for armed robbery. 540 F.2d at 1272.

[3] Testifying at the state habeas corpus hearing, the prosecutor could not recall whether the report had been in his trial file. The court, however, assumed that the prosecutor had possessed and had read the report prior to the trial. *Id.* at 1273.

[4] *Id.* at 1272. The victim, Pfister, answered cross-examination questions pertaining to his earlier identification in such a nebulous manner that it was impossible to characterize his testimony as contradictory or false. *Id.* at 1275-76 n.1 (Wisdom, J., dissenting).

[5] The police report contained the victim's physical description of two robbers. One robber, described as being "about 6'1" " and having a "slender build," supposedly struck the victim with a shovel. At trial, Pfister identified Garrison as the shovel-wielding assailant. Garrison, however, was "about five feet, five inches in height and stocky in build." *Id.* at 1272-73.

[6] *Id.* at 1273.

[7] In so ruling, the district court relied on Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). 540 F.2d at 1272.

[8] Although elements of procedural rules relating to discovery are occasionally involved, the suppression cases are governed by the due process clause of the fourteenth amendment. United States v. Agurs, 427 U.S. 97, 107-110 (1976); *cf.* Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant,* 74 YALE L.J. 136, 136 (1964) (suppression cases clarify the constitutional basis of discovery claims).

[9] 294 U.S. 103 (1935) (per curiam).

> [S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecutor.[17]

While the *Brady* Court stated that the ultimate purpose of the disclosure requirement was to ensure that the defendant received a fair trial,[18] the task of defining precisely how this requirement was to be effectuated was left to another day.[19]

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[10] Mooney alleged that

> the sole basis of his conviction was perjured testimony, which was knowingly used by . . . prosecuting authorities . . . and also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him.

Id. at 110. Unfortunately, the *Mooney* Court did not address the question raised as to the suppression of impeachment evidence.

[11] *Id.* at 112.

[12] *See, e.g.*, Miller v. Pate, 386 U.S. 1, 7 (1967) (prosecutor intentionally used false testimony and fraudulently misrepresented physical evidence); Alcorta v. Texas, 335 U.S. 28, 31 (1957) (prosecutor allowed witness to perjure himself and suppressed truthful testimony that would have impeached witness' credibility and corroborated the defense's contentions); Pyle v. Kansas, 317 U.S. 213, 216 (1942) (allegation made that state had coerced perjury).

[13] *E.g.*, Kyle v. United States, 294 F.2d 507, 514 (2d Cir. 1961), *cert. denied,* 377 U.S. 109 (1964) (if defendant has been prejudiced to a sufficient degree by suppression, reversal is required whether or not the case involves prosecutorial misconduct); United States *ex rel.* Thompson v. Dye, 221 F.2d 763, 767 (3d Cir.), *cert. denied*, 350 U.S. 875 (1955) (testimony supporting defense of lack of intent due to intoxication was suppressed even though prosecutor had not thought the evidence to be material); United States *ex rel.* Almeida v. Baldi, 195 F.2d 815, 820 (3d Cir.), *cert. denied*, 345 U.S. 904 (1952) (ignoring the question of prosecutorial fraud; suppression of evidence relating to the sentence of convicted murderer violated due process).

[14] 373 U.S. 83 (1963).

[15] *Id.* at 84. Boblit's confession was crucial since the jury was empowered by statute to restrict punishment to life imprisonment rather than death. *Id.* at 85.

[16] *Id.* at 86. See Comment, Brady v. Maryland *and the Prosecutor's Duty to Disclose,* 40 U. CHI. L. REV. 112, 113-15 (1972); Note, *supra* note 8, at 136-42.

[17] 373 U.S. at 87.

The resultant implementation of the *Brady* principle evidenced yet another expansionist trend.[20] Indicative of this movement were holdings which placed an affirmative duty upon the prosecutor to ascertain the existence of favorable evidence[21] and those which, in an effort to relax request requirements, found that a general request for *any* favorable evidence would suffice.[22] Finally, in *United States v. Agurs,*[23] the request trend climaxed when the Court, following the lead of several lower courts,[24] held that the prosecutorial duty to disclose could arise without *any* request by the defense.[25] In harmony with this initial trend of expansion, early decisions further established an affirmative prosecutorial duty to disclose evidence that might have affected the defendant's trial preparation[26] or that might have changed the jury's ultimate determination.[27]

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[18] *Id.*; Comment, *Implementing* Brady v. Maryland: *An Argument for a Pretrial Open File Policy*, 43 U. CIN. L. REV. 889, 889 (1974).

[19] Comment, *supra* note 16, at 115. *See generally* Comment, *Prosecutorial Misconduct: A National Survey*, 21 DEPAUL L. REV. 422 (1971).

[20] *See* Comment, *supra* note 16, at 115-131. *See* Comment, *Suppression: The Prosecution's Failure to Disclose Evidence Favorable to the Defense*, 7 U.S.F.L. REV. 348, 362 (1973) (defense request for disclosure only one factor in determining existence of breach of duty to disclose).

[21] Accordingly, such decisions required the prosecutor to disclose favorable and material evidence possessed by an "arm of the government." *See, e.g.,* United States v. Deutsch, 475 F.2d 55, 57-58 (5th Cir. 1973) (personnel file of a postal employee within the "arm of the government" and must be disclosed since it is easily attainable by the prosecution); Smith v. Florida, 410 F.2d 1349, 1351 (5th Cir. 1969) (suppression by police has same effect as suppression by prosecutor); Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964) (prosecutor's lack of involvement does not excuse police suppression).

[22] *E.g.,* Giles v. Maryland, 386 U.S. 66, 76 (1967) (general request to produce statements given by rape victim that were inconsistent with her other testimony was sufficient to require disclosure since the issue of consent depended on victim's credibility). The Court, however, in Moore v. Illinois, 408 U.S. 786 (1972), reiterated the importance of requiring a specific rather than a general request to ensure that the prosecution will not be subjected to virtual full disclosure. *Id.* at 792-98. *But see* Comment, *supra* note 16, at 115-131 (questions continued validity of specific request requirement).

[23] 427 U.S. 97 (1976).

[24] *E.g.,* Davis v. Heyd, 479 F.2d 446, 454 (5th Cir. 1973) (defense demand not a "uniform prerequisite" to federal relief); Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964) (disclosure required of police and prosecutors).

[25] 427 U.S. at 107-08.

[26] Ashley v. Texas, 319 F.2d 80, 85 (5th Cir.), *cert. denied,* 375 U.S. 931 (1963) (prosecutor should have realized contradictory medical reports would have supported insanity defense), *noted in* 77 HARV. L. REV. 1528 (1964).

[27] Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966) (disclosure required if evidence "might have led the jury to entertain a reasonable doubt about [defendant's] guilt"). *But see* Ross v. Texas, 474 F.2d 1150, 1152-53 (5th Cir. 1973) (rejecting the *Levin* approach). *See generally* Luna v. Beto, 395 F.2d 35, 39 (5th Cir. 1968) (en banc) (relief not granted since impeaching evidence was merely cumulative and it was clear beyond a reasonable doubt that the jury would not have been affected); Jackson v. Wainwright, 390 F.2d 288, 298-99 (5th Cir. 1968) (even in the absence of prosecutorial bad faith, court

On the other hand, the courts have refused to uniformly impose the *Brady* duty to disclose due to myriad factual variants prohibiting a general standard of materiality.[28] In *United States v. Keogh,*[29] however, the Second Circuit avoided the need for announcing such a standard by categorizing suppression cases as dependent upon the deliberateness of suppression, the intent to harm the defendant's case and the existence of a defense request for evidence.[30] Thus, the *Keogh* tripartite analysis raised the threshold of materiality in situations where no request was made or where suppression was not deliberate.[31] The Supreme Court first attempted to define materiality in the context of cases involving prosecutorial misconduct by the deliberate use of perjured testimony. In *Giglio v. United States,*[32] the Supreme Court announced that the use of false testimony would require a new trial if there were a reasonable likelihood that the jury's judgment was affected by such testimony.[33] However, the Court's failure to articulate a test for materiality applicable to cases where there was no deliberate prosecutorial misconduct and the defense made no specific disclosure request[34] resulted in the lower courts' adopting varied standards to govern these situa-

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unwilling to hold that suppression of an eyewitness identification that supported an alibi and damaged the victim's identification was harmless error).

[28] An accurate assessment of the difficulty courts would encounter in formulating a materiality standard of general applicability was provided in United States v. Dye, 221 F.2d 763, 763 (3d Cir. 1955) (Hastie, J., concurring): "[T]his is an area in which the question of fundamental fairness depends so much upon the facts of the particular case that a precise rule cannot be devised." *See* Comment, *supra* note 16, at 125; Comment, *Prosecutor's Constitutional Duty of Disclosure—Developing Standards Under Brady v. Maryland*, 33 U. PITT. L. REV. 785, 790 (1972).

[29] 391 F.2d 138 (2d Cir. 1968).

[30] For purposes of determining whether due process has been violated, Judge Friendly divided cases into the following categories: (1) deliberate suppression with intent to harm the defendant's case, (2) deliberate suppression of requested evidence without intent to harm the defense, and (3) passive nondisclosure where no disclosure request is made. *Id.* at 146-48.

[31] *Id.* at 146-47 ("deliberate suppression" includes a failure to disclose evidence that is so favorable and relevant that it could not have escaped the prosecutor's attention).

[32] 405 U.S. 150 (1972).

[33] *Id.* at 154, *quoting* Napue v. Illinois, 360 U.S. 264, 271 (1959) (failure to inform jury that witness may have had an interest in testifying against defendant is cause for new trial). For subsequent acknowledgements of the *Giglio* standard, see United States v. Agurs, 427 U.S. 97, 103 (1976) (strict standard of materiality applied in cases involving deliberate use of perjury); Armstrong v. Collier, 536 F.2d 72, 77 (5th Cir. 1976) (failure to disclose impeaching statements did not create requisite reasonable likelihood of affecting jury verdict); United States v. Johnson, 487 F.2d 1318, 1325 (5th Cir.), *cert. denied,* 419 U.S. 825 (1974) (knowing use of false evidence requires retrial if there is any reasonable likelihood that it affected verdict).

[34] *See* Moore v. Illinois, 408 U.S. 786, 796-97 (1972) (inaccurate description of man in a pretrial statement held inadequate to impeach positive trial identification and immaterial as to issue of guilt, but no definition of "materiality" given). *See also* Rice, *Criminal Defense Discovery: A Prelude to Justice or an Interlude for Abuse?*, 45 MISS. L.J. 887, 892-93 (1974) (author states that although the opinion does not define "materiality," *Moore* employed a harmless error standard that diminishes the defendant's constitutional rights).

tions.[35] In *United States v. Agurs,*[36] however, the Supreme Court resolved the debate by holding that constitutional error is committed in cases involving neither deliberate use of false evidence nor a request, whenever a "reasonable doubt" of guilt would be created by evidentiary disclosure.[37]

In addition to scrutinizing the conduct of prosecution and defense counsels, courts have examined the type of evidence suppressed in determining if the suppression amounts to constitutional error.[38] One specific type of evidence that has been particularly troublesome in suppression cases has been a witness' prior inconsistent statements.[39] Although inconsistent statements which were useful only for impeachment purposes have rarely required reversal,[40] the Supreme Court has held that the *Brady* materiality requirement is satisfied when the suppressed evidence could have been employed to impeach a key prosecution witness.[41] When the suppression of impeaching evidence was deliberate or involved the use of perjury, courts have resorted to the *Giglio* standard of materiality.[42] However, when nondisclosure was merely negligent, a new trial generally has not been required since impeachment evidence usually has been determined to have less impact than substantive evidence on the fairness of a trial.[43] Recent Fifth Circuit decisions, however, have taken a more liberal view in recognizing that impeachment evidence can have a highly signifi-

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[35] *See, e.g.,* United States v. Miller, 499 F.2d 736, 744 (10th Cir. 1974) (whether the evidence "might have led the jury to entertain a reasonable doubt about the defendant's guilt"); Ross v. Texas, 474 F.2d 1150, 1153 (5th Cir.), *cert. denied,* 414 U.S. 850 (1973) (evidence must create more than mere possibility that disclosure would alter results); United States v. Hibler, 463 F.2d 455, 460 (9th Cir. 1972) (same); United States v. Teague, 445 F.2d 114, 121 (7th Cir. 1971) ("[W]e do not believe that it was material nor that it would have led the jury to entertain a reasonable doubt about the defendant's guilt."); Evans v. Janing, 489 F.2d 470, 478 (8th Cir. 1970) ("We do not find in this case that 'significant chance' that the police report would induce a reasonable doubt in the jurors' minds . . . ."); United States v. Bonanno, 430 F.2d 1060, 1063-64 (2d Cir. 1970) (disclosure must significantly affect trial preparation); United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969) ("whether . . . there was a significant chance that this added item, developed by skilled counsel, . . . could have induced a reasonable doubt in the minds of enough jurors to avoid . . . conviction"); United States v. Tomaiola, 378 F.2d 26, 28 (2d Cir.), *cert. denied,* 389 U.S. 886 (1967) (evidence must be of substantial use to the defense); Ingram v. Peyton, 367 F.2d 933, 936 (4th Cir. 1966) ("the jury might well have entertained a reasonable doubt of Ingram's guilt"); Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966) ("evidence which . . . might have led the jury to entertain a reasonable doubt about appellant's guilt"). *See generally* Comment, *Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure,* 59 IOWA L. REV. 433, 455 (1973), wherein the author attempts to categorize existing tests into three standards: (1) evidence that may possibly by helpful to the defense, (2) evidence that creates a reasonable doubt as to guilt, and (3) evidence that creates a substantial likelihood of reversal.

[36] 427 U.S. 97 (1976), *noted in* 62 A.B.A.J. 1333 (1976).

[37] 427 U.S. at 112. Respondent argued that the prosecutor's failure to disclose that her victim had twice been convicted for carrying a deadly weapon warranted a new trial since such evidence would have substantiated respondent's claim of self-defense. *Id.* at 100.

In announcing this standard of "materiality," the majority warned that

> [b]ecause we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure. But to reiterate a critical point, the prosecutor will not have violated his constitutional duty . . . unless his omission is of sufficient significance to result in the denial of the defendant's right to a new trial.

Id. at 108. In dissent, Justices Marshall and Brennan found the majority's definition of "material" evidence too narrow to give the definition any "meaningful content." *Id.* at 114 (Marshall, J., dissenting).

[38] *See, e.g.,* United States v. Crockett, 534 F.2d 589, 601 (5th Cir. 1976) (past criminal record of witness); Shuler v. Wainwright, 491 F.2d 1213, 1222-23 (5th Cir. 1974) (victim's prior inconsistent statement). *See also* Comment, *supra* note 28, at 790-95 (to aid examination of materiality question, author groups evidence as follows: statements of eyewitnesses, physical evidence, impeachment evidence and inconsistent statements by witnesses).

[39] To deal with this problem in federal prosecutions, Congress enacted the Jencks Act,

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18 U.S.C. § 3500 (1970), *as amended,* 18 U.S.C. § 3500 (Supp. 1976), which provides, in pertinent part:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness . . . which relates to the subject matter as to which the witness has testified.

However, because the scope of the Jencks Act is limited to federal prosecution, it was inapplicable to the instant case.

[40] *E.g.*, Link v. United States, 352 F.2d 207, 212 (8th Cir.), *cert. denied*, 383 U.S. 915 (1965) (suppression of impeaching evidence showing witness' prior misidentification not grounds for reversal); *cf.* United States v. Crockett, 534 F.2d 589, 601 (5th Cir. 1976) (suppression of witness' past criminal record not grounds for reversal); United States v. Gloria, 494 F.2d 477, 484 (5th Cir. 1974), *cert. denied*, 419 U.S. 995 (1974) (not reversible error because no contradiction in testimony); Shuler v. Wainwright, 491 F.2d 1213, 1222-23 (5th Cir. 1974) (the prosecutor is not required to disclose all police investigatory work). *But see* Davis v. Heyd, 479 F.2d 446, 451-53 (5th Cir. 1973) (nondisclosure in inconsistency in statements which would have tended to corroborate the defense of accidental discharge violated due process); Powell v. Wiman, 287 F.2d 275, 279-82 (5th Cir. 1961) (denial of due process when state allowed witness to testify to facts contrary to prior undisclosed written statements).

[41] Giglio v. United States, 405 U.S. 150, 152-54 (1972); Giles v. Maryland, 386 U.S. 66, 76 (1967); *see* Fahringer, *Has Anyone Here Seen Brady?: Discovery in Criminal Cases*, 9 CRIM. L. BULL. 325, 330-34 (1973) (author argues that the slightest impeaching evidence may create a doubt in the jury's mind and that the jury rather than appellate judges should have the privilege of weighing the relevant evidence).

[42] *E.g.*, DeMarco v. United States, 415 U.S. 449 (1974) (reemphasized that a conviction is invalid if the government permits one of its witnesses to falsely deny a promise of leniency made in exchange for his testimony); United States v. Librach, 520 F.2d 550, 553 (8th Cir. 1975) (court called for new trial based on prosecutorial suppression of evidence that was both favorable and material to the defense); United States v. Johnson, 487 F.2d 1318, 1325 (5th Cir.), *cert. denied*, 419 U.S. 825 (1974) (presentation of known false evidence and nondisclosure of evidence affecting credibility were grounds for retrial).

[43] *See, e.g.,* United States v. Harris, 462 F.2d 1033, 1035 (10th Cir. 1972). United States v. Miller, 411 F.2d 825 (2d Cir. 1969), contains one of the most often cited standards applicable to a determination of whether nondisclosure of impeaching evidence constitutes reversible error:

> Negligent or even intentional failure of the prosecutor to disclose an additional item of impeaching evidence would not invariably require that a verdict be set aside [unless] there was a significant chance that this added item, developed by skilled counsel . . . could have induced a *reasonable doubt* in the minds of enough jurors to avoid a conviction.

Id. at 832. (emphasis added).

cant effect on the verdict,[44] particularly where other substantive evidence is not overwhelming.[45]

In the instant case, the court began its analysis by dividing suppression cases into three categories for the purpose of delineating the precise due process issue presented.[46] Since the facts did not reveal a knowing use of perjured testimony,[47] and since the defense did not request production of the police report in question, the majority concluded that the district court's application of *Giglio*[48] and *Brady*[49] standards was inappropriate.[50] Because the prosecutor had merely failed to volunteer evidence favorable to the defense, the court instead placed the case in the *Agurs* category.[51] However, the court reasoned that the distinctions between the exculpatory evidence withheld in *Agurs* and the impeachment evidence in the instant case justified the adoption and application of an even stricter standard of materiality than that announced in *Agurs*.[52] The purpose of the disclosure requirement is to enhance the fairness of trials by increasing the amount of relevant evidence before the jury.[53] Anticipating the contention that imposition of the stricter standard would frustrate this purpose, the court responded that since disclosure of impeaching evidence may make witnesses reluctant to testify,[54] and since the prosecutor is given sufficient incentive to disclose significant impeachment evidence,[55] the objective of providing a full and fair hearing would be properly served by requiring petitioners to demonstrate that the impeachment evidence "probably would have resulted in an acquittal."[56] Since the victim's trial identification of the petitioner was "unequivocal,"[57] the court concluded that the contents of the report satisfied neither the reasonable doubt standard of *Agurs* nor the stricter test of materiality announced with respect to pure impeachment evidence.[58]

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[44] United States v. Hildebrand, 506 F.2d 406, 409 (5th Cir.), *cert. denied,* 421 U.S. 968 (1975) (*Brady* applies to both exculpatory and impeaching evidence unless merely cumulative); United States v. Deutsch, 475 F.2d 55, 57-58 (5th Cir. 1973) (constitutional duty to disclose personnel file of government's sole witness); Williams v. Dutton, 400 F.2d 797, 800 (5th Cir. 1968) (prosecutor has a duty to disclose requested evidence whether direct or merely impeaching in nature). *But see* Calley v. Calloway, 519 F.2d 184, 221 (5th Cir.), *cert. denied,* 425 U.S. 911 (1975) (reversal not granted unless impeachment evidence would have had definite impact on credibility of key witness).

[45] Armstrong v. Collier, 536 F.2d 72, 77 (5th Cir. 1976) (weight put on other evidence to decide if nondisclosure is reversible error); United States v. Muckenstrum, 515 F.2d 568, 569 (5th Cir.), *cert. denied,* 423 U.S. 1032 (1975) (when other evidence is overwhelming, nondisclosure is harmless error); Flanagan v. Henderson, 496 F.2d 1274, 1277 (5th Cir. 1974) (ordered in camera inspection to determine if rape victim's original statement charging man other than defendant with crime was exculpatory in context of complete record).

In the same context, FED. R. CRIM. P. 33 has been interpreted to completely exclude impeachment evidence as a basis for a new trial. Accordingly, in order for a motion for a new trial to meet with success, newly discovered substantive evidence must be such that it probably would have produced an acquittal. United States v. Jacquillon, 469 F.2d 380, 388 (5th Cir.), *cert. denied,* 410 U.S. 938 (1972); United States v. Rodriguez, 437 F.2d 940, 942 (5th Cir. 1971).

[46] 540 F.2d at 1273. The three categories include: (1) prosecutorial tolerance of perjury (*Giglio*); (2) prosecutorial suppression of favorable evidence relating to guilt or punishment after a specific disclosure request by the defense (*Brady*); and (3) failure to volunteer favorable evidence to the defense (*Agurs*). This tripartite analysis was initially employed in United States v. Agurs, 427 U.S. 97, 103-07 (1976).

[47] 540 F.2d at 1273; *see id.* at 1275 n.1 (Wisdom, J., dissenting).

[48] See notes 41 & 42 and accompanying text *supra.*

[49] *See* notes 14 & 15 and accompanying text *supra.*

[50] 540 F.2d at 1273.

[51] *Id.* For a discussion of *Agurs*, see notes 36 & 37 and accompanying text *supra.*

[52] *Id.* at 1273-74.

[53] *Id.* at 1274. *See generally* note 18 and accompanying text *supra.*

[54] 540 F.2d at 1274. The majority concluded that requiring a prosecutor to volunteer

In a dissenting opinion, Judge Wisdom first attacked the majority's unprecedented adoption of the test applied under Rule 33 of the Federal Rules of Criminal Procedure as the standard of materiality for undisclosed impeaching evidence.[59] Instead, he reasoned that since the focus properly should be on the *impact* rather than the *type* of evidence involved, the *Agurs* standard should be applied to impeachment as well as exculpatory evidence.[60] Additionally, Judge Wisdom questioned the majority's characterization of the suppressed discrepancy between the pretrial statement and Garrison's actual appearance as "purely impeaching evidence."[61] Since disclosure also would have supported Garrison's substantive alibi defense,[62] he concluded that the report represented both impeaching and exculpatory evidence.[63] Agreeing with the district court, the dissent concluded that since the police report could have been used to impeach the government's sole witness and thereby destroy the state's entire case,[64] Garrison was clearly entitled to a new trial under the *Agurs* rule.[65]

The majority's distinction in the instant case between types of evidence[66]

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impeachment evidence would have an adverse effect on the willingness of prosecution witnesses to freely discuss the case. *Id.*

[55] *See id.*

[56] *Id.*

[57] *Id. But see id.* at 1275 n.1 (Wisdom, J., dissenting). The same test is applied under FED. R. CRIM. P. 33 to motions for a new trial based upon "newly discovered evidence." 540 F.2d at 1274.

[58] *Id.* Regardless of which particular standard is employed, the court noted that a failure to disclose impeaching evidence will rarely be of "sufficient significance to result in a denial of the defendant's right to a fair trial." *Id.*

[59] *Id.* at 1275 (Wisdom, J., dissenting). Judge Wisdom stressed the fact that the Supreme Court in *Agurs* rejected the idea that the standard of FED. R. CRIM. P. 33 should be applied to nondisclosure of *exculpatory* evidence and argued that the same rejection should also control where nondisclosed *impeaching* evidence is involved. *Id.*, *citing* Giglio v. United States, 405 U.S. 150 (1972); Giles v. Maryland, 386 U.S. 66 (1967); Napue v. Illinois, 360 U.S. 264 (1959); Comment, *supra* note 35, at 438.

[60] 540 F.2d at 1276 (Wisdom, J., dissenting).

[61] *Id.* at 1276-77.

[62] *Id.* at 1277. Judge Wisdom noted that the prosecutors readily admitted that Garrison's alibi witnesses were credible, *id.* at 1276 n.4, and that he considered the inconsistent identification to contradict other trial testimony and material. *Id.* at 1277 n.5.

[63] *Id.* at 1277. It is relatively clear that a witness' prior inconsistent statements may rise to the level of exculpatory evidence. *See* Giles v. Maryland, 386 U.S. 66, 67 (1967); Alcorta v. Texas, 355 U.S. 28, 31-32 (1957); Davis v. Heyd, 479 F.2d 446 (5th Cir. 1973).

[64] 540 F.2d at 1277 (Wisdom, J., dissenting).

[65] *Id.* at 1278.

[66] Although the results in cases involving different types of evidence have characteristically differed depending on the type of evidence suppressed, *see* Comment, *supra* note 28, pre-*Garrison* courts had not applied a separate standard because undisclosed evidence

and the resulting imposition of a separate standard of materiality for impeachment evidence tends to further diminish[67] the defendant's right to a fair trial by limiting his access to the prosecution's evidence. Although courts have applied divergent standards of materiality in the past, these standards have not been based on types of evidence.[68] Indeed, a separate classification of impeachment evidence appears unwarranted since the Supreme Court has recognized that impeachment evidence can be highly significant[69] and that *Brady* principles apply to both substantive and impeachment evidence.[70] The distinction is further undermined by the realization that evidence affecting the credibility of a witness may also tend to exculpate a defendant by strengthening his alibi defense.[71] If the majority felt compelled to distinguish types of evidence, a more appropriate division would have focused on the nondisclosure of inconsistent statements[72] as opposed to the nondisclosure of impeachment or substantive evidence. The majority decision is further strained by its adoption of a standard previously rejected by *Agurs*[73] and by the ease with which the decision could have been avoided. In addition to the majority's admission that the *Agurs* standard could have been applied with the same result,[74] the decision could have

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was typed as impeaching rather than exculpatory. *See, e.g.,* Giglio v. United States, 405 U.S. 150, 154 (1972); Alcorta v. Texas, 355 U.S. 28, 31-32 (1957); United States v. Hildebrand, 506 F.2d 406, 409 (5th Cir.), *cert. denied,* 421 U.S. 965 (1975); Flanagan v. Henderson, 496 F.2d 1274, 1277 (5th Cir. 1974); United States v. Deutsch, 475 F.2d 55, 57 (5th Cir. 1973); Williams v. Dutton, 400 F.2d 797, 800 (5th Cir. 1968).

[67] The Supreme Court had already limited the prosecutor's duty by declaring that the constitutional rights of a defendant promoted by the *Brady* disclosure rule do not extend to all police investigatory work. United States v. Agurs, 427 U.S. 97, 109 (1976); Moore v. Illinois, 408 U.S. 786, 795 (1972).

[68] *But see* Link v. United States, 352 F.2d 207 (8th Cir.), *cert. denied,* 383 U.S. 915 (1965). The *Link* court ruled that impeaching evidence need not be disclosed unless its suppression would result in a fundamentally unfair trial for the defendant. 352 F.2d at 212. This stance is in line with *Brady*'s ultimate purpose of ensuring that the defendant has a fair trial and merely prohibits cumulative or speculative evidence from constituting reversible error.

[69] Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the . . . reliability of a given witness may well be determinative of guilt or innocence . . . .").

[70] *See, e.g.,* Giles v. Maryland, 386 U.S. 66, 87 (1967); United States v. Deutsch, 475 F.2d 55, 57 (5th Cir. 1973); Williams v. Dutton, 400 F.2d 797, 800 (5th Cir. 1968).

[71] While the majority stated that purely impeaching evidence is significantly different from evidence supporting a claim of self-defense, 540 F.2d at 1273-74, the Fifth Circuit had previously held that inconsistent statements capable of impeaching a witness' testimony were material to self-defense and accidental discharge claims. Davis v. Heyd, 479 F.2d 446, 453 (5th Cir. 1973). By failing to recognize that disclosure may have enhanced Garrison's alibi, the majority ignored the fact that an alibi defense can be as exculpatory as a self-defense claim. *See generally* Alcorta v. Texas, 355 U.S. 28, 31-32 (1957) (impeaching evidence supported alibi); Jackson v. Wainwright, 390 F.2d 288, 299 (5th Cir. 1968) (in light of alibi defense, identification characterized as a "crucial issue").

[72] *See* Davis v. Heyd, 479 F.2d 446, 451 (5th Cir. 1973) ("question of materiality arises only if the nondisclosed evidence is determined to be inconsistent with the trial testimony"); Powell v. Wiman, 287 F.2d 275, 279-81 (5th Cir. 1961) (prosecution witness allowed to testify in contradiction to prior statements).

[73] See notes 23 through 25 and accompanying text *supra*.

[74] 540 F.2d at 1274. Although a theoretical argument can be made that "creates a

been predicated upon a summary finding that the witness' vague testimony did not significantly contradict his pretrial statement. Without any inconsistency in testimony or in the pretrial description,[75] the prosecutor would have had no constitutional duty to disclose the report.[76] The court could thus have obviated the need to apply any standard of materiality to the police report.

Regardless of the available alternatives or apparent inconsistencies, the Fifth Circuit's move toward a more strict standard was not without justification. While the only announced policy consideration for the decision was a desire to stimulate full disclosure by government witnesses,[77] the court was surely influenced by its constant desire to reduce appeals and thus alleviate judicial expense. The move toward a more strict standard was also consistent with the latest Supreme Court decision on materiality, *United States v. Agurs,*[78] which promulgated a more stringent standard than that previously applied by the individual circuits. Though a more detailed presentation of its policy arguments would certainly have enhanced the majority's decision, its justification was apparent. The only question that remains is whether this new limitation on the prosecutorial duty to disclose will abrogate the tremendous strides made toward equalizing the government's superior investigating powers and the defendant's right of discovery.

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reasonable doubt" is substantially the same standard in a criminal trial as "would result in an acquittal" because proof of a reasonable doubt is sufficient to acquit a criminal defendant, it is obvious that the court intended that a stricter interpretation be given this new standard.

[75] Pfister's vague characterization of both assailants as "the other fellow" makes it unclear whether he was denying or admitting the fact that his pretrial description of Garrison was inaccurate. 540 F.2d at 1275 n.1 (Wisdom, J., dissenting).

[76] *See* United States v. Gloria, 494 F.2d 477, 484 (5th Cir.), *cert. denied*, 419 U.S. 995 (1974) (no reversible error if no contradiction in witness' testimony).

[77] See note 54 *supra.*

[78] 427 U.S. 97 (1976); *see* notes 36 & 37 and accompanying text *supra.*

CRIMINAL LAW—MENTAL COMPETENCY—DEFENDANT'S COMPETENCY TO CONDUCT A RATIONAL DEFENSE MUST BE TESTED AT THE STATE HOSPITAL OR THROUGH OTHER APPROPRIATE MEANS—*M'Naghten* TEST OF CRIMINAL RESPONSIBILITY RETAINED

Following his Calhoun County conviction for capital murder,[1] the defendant, Billy Dale Hill, appealed on the dual grounds of the inadequacy of psychiatric examinations conducted to determine his present competency to stand trial and the use of the *M'Naghten* test in ascertaining his criminal responsibility at the time of the crime.[2] The trial court sustained the defendant's pretrial motion[3] requesting a transfer to the Mississippi State Hospital at Whitfield for psychiatric examinations,[4] but instead of sending the defendant to the State Hospital, the court ordered an examination by a local psychiatrist.[5] At a preliminary hearing[6] to determine the defendant's ability to conduct a rational defense, the psychiatrist testified[7] that the defendant had been able to distinguish right from wrong at the time of the crime and was competent to stand trial.[8] The trial court concluded at the close of the hearing that the defendant was presently capable of conducting a rational defense[9] and proceeded to the trial on the merits. Subsequently, the defendant's claim of insanity at the time of the crime failed under the *M'Naghten* test of criminal responsibility traditionally applied in Mississippi.[10] On appeal to the Mississippi Supreme Court, while affirming the use of the *M'Naghten* rule,[11] *held*, reversed and remanded. In a criminal prosecution, when a psychiatrist who has conducted a brief pretrial examination recommends further testing of the defendant, his examination is not an adequate determination of insanity, and the defendant should be further tested at the State Hospital or otherwise afforded an appropriate determination of mental competency to conduct a rational defense before being tried again. *Hill v. State*, 339 So. 2d 1382 (Miss. 1976), *cert. denied*, 97 S. Ct. 1689 (1977).

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[1] Defendant, an 18-year-old male, was charged with the rape and murder of an elderly woman. Hill v. State, 339 So. 2d 1383, 1385 (Miss. 1976), *cert. denied,* 97 S. Ct. 1689 (1977). MISS. CODE ANN. § 97-3-19(2) (e) (Supp. 1976), provides:

> The killing of a human being without the authority of the law by any means or in any manner shall be capital murder in the following cases: When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, . . . or in any attempt to commit such felonies.

[2] 339 So. 2d at 1385. Although not within the scope of this Note, the defendant also challenged his conviction on the grounds that Mississippi's capital murder statutes, MISS. CODE ANN. §§ 97-3-19, -21, 99-17-20 (Supp. 1976), are unconstitutional and that the jury instructions did not meet the statutory restraints of MISS. CODE ANN. § 99-13-7 (1972), 339 So. 2d at 1386. The court, relying on Jackson v. State, 337 So. 2d 1242 (Miss. 1976), summarily dismissed the defendant's contentions in this respect. 339 So. 2d at 1386.

[3] This motion was within the rights of defense counsel under MISS. CODE ANN. § 99-13-11 (1972), which states:

> In any criminal action in the circuit court in which the mental condition of a person indicted for a felony is in question, the court or judge in vacation on motion duly made by the defendant, the district attorney or on the motion of the court or judge, may order such person to submit to a mental examination by a competent psychiatrist selected by the court to determine his ability to make a defense; provided, however, any cost or expense in connection with such mental examination shall be paid by the county in which such criminal action is pending.

[4] Although the trial court originally overruled the motion, it reconsidered and, since the state had not objected, found that the motion should have been sustained. 339 So. 2d at 1384.

[5] The trial court appointed Dr. Charles H. Hubbert, a psychiatrist employed by the Region II Mental Health Clinic in Oxford, Mississippi. *Id.*; *see* MISS. CODE ANN. § 99-13-11 (1972).

[6] *See, e.g.,* Conn v. State, 260 So. 2d 471, 475 (Miss. 1972) (preliminary hearing before a jury is required if reasonable probability of insanity has been raised).

[7] The psychiatrist did not know the defendant and had only examined him on one occasion without the benefit of any previous history. 339 So. 2d at 1384.

[8] *Id.* At the close of his testimony, however, the psychiatrist recommended that further professional opinions be sought concerning the defendant's criminal responsibility:

The rule[12] that a person is to be held criminally responsible for a crime if he knew the difference between right and wrong at the time of the offense has its origin in the landmark *M'Naghten's Case.*[13] The *M'Naghten* test has been generally recognized as the first true criterion for determining criminal responsibility, and it has weathered the test of time in a majority of American jurisdictions.[14] Some jurisdictions, however, have chosen not to rely exclusively on

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> *However, I recommend that other opinion* [sic] *be rendered concerning the defendant's criminal responsibility and that psychological testing and possibly an electroencephalogram be done as part of this other opinion. Ideally, this could be accomplished through one of the state hospitals.*

Id.

Also testifying at the preliminary hearing were the defendant's court-appointed attorney, who stated that the defendant was incapable of helping in the preparation of a rational defense, and the defendant's relatives, who testified as to the defendant's aberrant behavior. *Id.*

[9] The trial court also overruled a renewed motion to send the defendant to the State Hospital for further examination. *Id.* at 1385.

[10] *Id.* at 1384. For Mississippi's definition of *M'Naghten*, see Eatman v. State, 169 Miss. 295, 299, 153 So. 381, 381 (1934), which defines the *M'Naghten* test as a method of determining the ability of the accused at the time of the act to distinguish right from wrong.

[11] Three justices rejected the continued use of *M'Naghten* in a specially concurring opinion.

[12] *See generally* Annot., 45 A.L.R. 2d 1447, 1452-53 (1956).

[13] 8 Eng. Rep. 718 (1843). M'Naghten, who had killed a man while under an insane delusion that the man had injured him, was acquitted on the ground of insanity. Chief Justice Tindal stated:

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.

Id. at 722.

[14] Harvey v. State, 207 So. 2d 108, 111 (Miss. 1968). For other jurisdictions which employ the *M'Naghten* rule, *see, e.g.*, Picott v. State, 116 So. 2d 626, 627 (Fla. 1959), *appeal dismissed*, 364 U.S. 293 (1960) (accepted *M'Naghten* by rejecting irresistable impulse and New Hampshire tests); State v. Arthur, 160 N.W.2d 470, 478 (Iowa 1968)

M'Naghten and have altered the test to be applied. One of the first changes to achieve judicial approval was the "irresistable impulse" test,[15] which operates on the theory that insanity may affect the volitional as well as the cognitive faculty. Under this theory, the accused should not be regarded as criminally responsible where his mental defect or disease has rendered him unable to distinguish right from wrong or where, if he was capable of making such a distinction, he was unable to choose between them.[16] This test primarily supplements the *M'Naghten* test, as opposed to replacing it, and the jurisdictions which acknowledge the test have applied it in conjunction with *M'Naghten.*[17] Still other courts have completely abandoned the *M'Naghten* test. In *State v. Jones,*[18] the New Hampshire Supreme Court promulgated a procedure that abolished the requirement of a set standard by allowing the jury to make an unfettered determination of criminal responsibility based on all the facts.[19] The celebrated case of *Durham v. United States*[20] represents another departure from *M'Naghten* in its recognition that the accused cannot be held criminally responsible if his unlawful conduct was the product of a mental disease or mental

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(accepted *M'Naghten* by rejecting irresistable impulse, *Durham* and all other tests); State v. Jenkins, 236 La. 256, 107 So. 2d 632, 637 (1958), *cert. denied,* 359 U.S. 998 (1959) (acceptance of *M'Naghten*). It has been recognized that *M'Naghten* offered a two-pronged test of criminal responsibility: (1) knowledge of the nature and quality of the act, and (2) knowledge of its wrongfulness. If either of these criteria was met, the defendant was insane. Although recognition of only the "right and wrong" aspect of *M'Naghten* unjustifiably narrows the test, many jurisdictions have limited the test strictly to this determination. Graham v. State, 547 S.W.2d 531, 539 (Tenn. 1977).

[15] *See, e.g.,* Parsons v. State, 81 Ala. 577, 2 So. 854, 866-67 (1887) (defendant is not legally responsible if he was affected by a disease of the mind at the time of the crime and did not know right from wrong or had lost the power to choose between right and wrong); Downs v. State, 231 Ark. 466, 330 S.W.2d 281, 283-84 (1959) (rejecting New Hampshire and *Durham* doctrines but retaining combination of *M'Naghten* and irresistable impulse test); State v. Staten, 18 Ohio St. 2d 13, 247 N.E.2d 293, 295-99 (1969) (implying use of irresistable impulse test with *M'Naghten* although court failed to use specific terminology). *See generally* Comment, *Insanity as a Defense in Criminal Cases in Mississippi,* 32 Miss. L.J. 74, 96-97 (1960).

[16] *See* Barbour v. State, 262 Ala. 297, 78 So. 2d 328, 340 (1954) (use of irresistable impulse test in conjunction with *M'Naghten* to reach this result). *See also* Annot., 45 A.L.R.2d 1447, 1451-58 (1956) (general discussion of irresistable impulse and *M'Naghten* tests and the states which employ them).

[17] *See, e.g.,* Barbour v. State, 262 Ala. 292, 78 So. 2d 328, 340 (1954) (irresistable impulse used with *M'Naghten*); Stewart v. State, 233 Ark. 458, 345 S.W.2d 472, 474, *cert. denied,* 368 U.S. 935 (1961) (same).

[18] 50 N.H. 369 (1871).

[19] *Id.* at 398-99; *see* State v. Pike, 49 N.H. 399, 441-42 (1869) (a right-and-wrong test was an improper effort to state as a matter of law what was purely a question of fact for the jury), *overruled on other grounds,* Hardy v. Merrill, 56 N.H. 227 (1875). Most authorities have construed the New Hampshire doctrine as closely analogous to the *Durham* test, see notes 21 & 22 and accompanying text *infra,* but there have also been arguments and comparisons to the contrary. *See generally* Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity,* 69 Yale L.J. 367 (1960).

[20] 214 F.2d 862, 874 (D.C. Cir. 1954).

defect.[21] More recently, yet another test of criminal responsibility was adopted by the American Law Institute as section 4.01 of the Model Penal Code.[22] Section 4.01 provides that a person was not criminally responsible at the time of the act if as a result of a mental disease or defect he lacked the substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.[23] Since its formulation, section 4.01 has been adopted by an increasing number of jurisdictions and, significantly, by the federal courts.[24] The United States Court of Appeals for the Second Circuit initiated the trend when it overturned the *M'Naghten* rule in favor of section

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[21] *Id.* at 874-75. *See generally* United States v. Freeman, 357 F.2d 606, 620-24 (2d Cir. 1966); Moore, *M'Naghten Is Dead—Or Is It?*, 3 HOUS. L. REV. 58, 60-62, 67-71 (1965). This test has since been replaced by the Model Penal Code provision adopted in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

[22] MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962). This adoption culminated nine years of research, exploration and consideration by some of the leading legal and medical minds in the country. United States v. Freeman, 357 F.2d 606, 622 (2d Cir. 1966).

[23] MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962) provides:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

A secondary aspect adopted by many jurisductions is considered by the MODEL PENAL CODE § 4.01(2) (Proposed Official Draft 1962) which provides: "As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." There is, however, a split among jurisdictions regarding adoption of this part of section 4.01. *See, e.g.*, Wade v. United States, 426 F.2d 64, 71-73 (9th Cir. 1970) (rejecting adoption of section 4.01(2) while accepting section 4.01(1)); Blake v. United States, 407 F.2d 908, 915-16 (5th Cir. 1969) (accepting section 4.01 in full).

[24] A majority of the United States Courts of Appeals have discarded *M'Naghten* in favor of a modified or complete version of section 4.01. United States v. Brawner, 471 F.2d 969, 979 (D.C. Cir. 1972); United States v. Frazier, 458 F.2d 911, 915 (8th Cir. 1972); Wade v. United States, 426 F.2d 64, 65 (9th Cir. 1970); Blake v. United States, 407 F.2d 908, 915 (5th Cir. 1969); United States v. Smith, 404 F.2d 720, 727 (5th Cir. 1969); United States v. Chandler, 393 F.2d 920, 927 (4th Cir. 1968); United States v. Shapiro, 383 F.2d 680, 685-88 (7th Cir. 1967); United States v. Freeman, 357 F.2d 606, 624 (2d Cir. 1966); Wion v. United States, 325 F.2d 420, 430 (10th Cir. 1963); United States v. Currens, 290 F.2d 751, 775 (3rd Cir. 1961).

For those states which have adopted section 4.01 in part or in full, see Schade v. State, 512 P.2d 907, 911 (Alas. 1973); State v. White, 93 Idaho 153, 456 P.2d 797, 802 (1969); Hill v. State, 252 Ind. 601, 251 N.E.2d 429, 438 (1969); Terry v. Commonwealth, 371 S.W.2d 862, 865 (Ky. 1963); Commonwealth v. McHoul, 352 Mass. 544, 226 N.E.2d 556, 559 (1967); State v. Staten, 25 Ohio St. 2d 107, 267 N.E.2d 122, 124 (1971); Graham v. State, 547 S.W.2d 531, 543-44 (Tenn. 1977); State v. Grimm, 195 S.E.2d 637, 645 (W. Va. 1973); State v. Shoffner, 31 Wis.2d 412, 143 N.W.2d 458, 465 (1966); CONN. GEN. STAT. ANN. § 53a-13 (West 1972); ILL. ANN. STAT. ch. 38, § 6-2 (Smith-Hurd 1972); MD. ANN. CODE art. 59, § 25 (1972); MO. REV. STAT. § 552.030(1) (Vernon 1973); MONT. REV. CODES ANN. § 95-501 (1969); TEX. PENAL CODE ANN. tit. 2, § 8.01 (Vernon 1974); VT. STAT. ANN. tit. 13, § 4801 (1974).

4.01 in *United States v. Freeman.*[25] A lengthy comparison of the two tests led the Second Circuit to conclude that the *M'Naghten* test is inadequate because it focuses only on the cognitive aspect of the personality and thus does not allow the jury to consider as criminally irresponsible those persons who are able to distinguish between good and evil but who cannot control their behavior within that distinction.[26] The court concluded that such a narrow emphasis could result in injustice since the developed opinions of psychiatrists and the jury's decision are restricted to the sole question of whether the accused knew right from wrong at the time of the act.[27] To support its adoption of section 4.01, the court emphasized that avoidance of criminal responsibility under the section could not be justified by a finding of *any* form of incapacity, but added that total incapacity is also unnecessary.[28] To allow proper consideration of the incapacity requirement, section 4.01 expanded the utilization of meaningful psychological testimony and thus gave the jury the opportunity to make its final decision fully informed as to the facts.[29]

Despite the changes made by other jurisdictions, the Mississippi Supreme Court has consistently rejected offers of any test other than *M'Naghten.*[30] In *Cunningham v. State,*[31] the court adopted the *M'Naghten* test as the exclusive test of criminal responsibility in Mississippi[32] reasoning that acceptance of insanity as an excuse for a crime could not be justified unless the criminal had no "perception of the difference between right and wrong."[33] A more modern statement of the *M'Naghten* test was set forth in *Eatman v. State.*[34] The *Eatman* court held that a determination of criminal responsibility under the test turns on "the ability of the accused, at the time he committed the act, to realize and appreciate the nature and quality thereof—his ability to distinguish right from wrong."[35] This rule remains the test of criminal responsibility in Mississippi.[36]

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[25] 357 F.2d 606 (2d Cir. 1966).

[26] *Id.* at 618.

[27] *Id.* at 618-19. The court pointed out that such restrictions cause *M'Naghten* to be grossly unrealistic because they fail to acknowledge the "tremendous growth in psychiatric knowledge." *Id.* at 619-20.

[28] *Id.* at 623. The jury's determination of criminal responsibility should fall between these two extremes.

[29] *Id.* at 622-23. Acknowledging that section 4.01 is not "faultless," the court nevertheless found it to be an infinite improvement over the outmoded *M'Naghten* test. *Id.* at 624. More recent decisions have further emphasized the advantages of section 4.01. *See, e.g.,* United States v. Frazier, 458 F.2d 911, 917-18 (8th Cir. 1972) (section 4.01 provides "broader medical-legal investigation" with improved means of communication, thereby offering a sounder basis for comprehension of the complex issues by the jury); Graham v. State, 547 S.W.2d 531, 543-44 (Tenn. 1977) (adopting section 4.01 because it alleviates *M'Naghten*'s failure to recognize that one may be able to distinguish right and wrong yet still suffer from serious mental disorders).

[30] *See, e.g.,* Herron v. State, 287 So. 2d 759, 765 (Miss.), *cert. denied,* 417 U.S. 472 (1974) (rejection of irresistable impulse test); Eatman v. State, 169 Miss. 295, 299, 153 So. 381, 381-82 (1934) (irresistable impulse defense not available unless the impulse was so great as to prevent the accused from distinguishing right from wrong).

[31] 56 Miss. 269 (1879).

[32] Although the court actually adopted the "right-and-wrong" test for the first time in Brovard v. State, 30 Miss. 60 (1856), *Cunningham* is generally viewed as the landmark case in this area of Mississippi law. Comment, *supra* note 15, at 91 n.98.

[33] 56 Miss. at 276. *Cunningham* also recognized insane delusions as grounds for lack of criminal responsibility, *id.* at 277, but the supreme court subsequently overruled this supplemental test in Kearney v. State, 68 Miss. 233, 240-41, 8 So. 292, 294 (1890). See Comment, *supra* note 15, at 93.

Although standards of criminal responsibility have varied, the principle that no human being may be criminally tried or punished while he is presently insane has been uniformly entrenched in both English and American common law.[37] The judiciary has firmly established this rule in Mississippi[38] and has concluded that to hold differently would be a denial of due process and contrary to public policy.[39] However, the procedural aspect of determining present insanity in Mississippi has not been specifically set forth by any set of rules but has instead developed as a finely woven combination of case law and statutes.[40] An integral part of this combination is *Hawie v. State.*[41] In *Hawie,* the trial had been postponed because the defendant was determined insane and therefore incapable of conducting a rational defense. After reconvening the case for trial at the next term, the defendant's motion for reinquiry into his present mental condition was overruled. On appeal from the subsequent conviction, the Mississippi Supreme Court reversed and remanded, declaring that if the defendant's insanity is suggested to the court by motion or by physical appearance, the question of sanity should be investigated and, if the defendant is found to be presently insane, his trial should not proceed until he has recovered his sanity.[42] The opinion further stated that the obligation to investigate is not discharged by simply postponing a trial; rather, the sanity issue should be redetermined each time it arises with the test of insanity being the defendant's ability to make a rational defense.[43] The investigatory obligation was later clarified in *Shipp v. State*[44] where the court held that a pretrial showing to the judge which raises a reasonable probability of the defendant's present insanity requires submission of the issue to the jury.[45] A motion suggesting present insanity, however, is insufficient to halt the trial unless it is accompanied by sworn affidavits of counsel or the offer of witnesses to testify.[46] These procedural requirements remained as the basic guidelines for determining sanity throughout succeeding years,[47] with any major alterations left to legislative initiative.

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[34] 169 Miss. 295, 153 So. 381 (1934).

[35] *Id.* at 299, 153 So. at 381.

[36] For present support of the *Eatman* rule, see Edmond v. State, 312 So. 2d 702, 704 (Miss. 1975) (rejecting irresistable impulse and retaining *M'Naghten* test); Bean v. State, 297 So. 2d 903, 904 (Miss. 1974) (retaining *M'Naghten* test); Myrick v. State, 290 So. 2d 259, 262 (Miss. 1974) (retaining *M'Naghten* and holding that defendant's properly raising insanity issue shifts burden to state to prove sanity beyond a reasonable doubt).

[37] Howie v. State, 121 Miss. 197, 216-19, 83 So. 158, 159-60 (1919). *See generally* H. WIEHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE, 428-30 (1954).

[38] *See, e.g.,* McGinnis v. State, 241 Miss. 883, 891, 131 So. 2d 399, 401 (1961) (due process requires that defendant be capable of making rational defense before being tried); Howie v. State, 121 Miss. 197, 216-19, 83 So. 158, 159-60 (1919) (implication that an insane person may not be tried was drawn from common law).

[39] Williams v. State, 205 Miss. 515, 524, 39 So. 2d 3, 4 (1949); *see* MISS. CONST. § 26 (providing that in criminal prosecutions the accused shall have the right to be heard by himself, counsel or both).

[40] *See* Comment, *supra* note 15, at 75-83.

[41] 125 Miss. 589, 88 So. 167 (1921).

[42] *Id.* at 596, 88 So. at 167.

[43] *Id.* at 596-97, 88 So. at 167.

[44] 215 Miss. 541, 61 So. 2d 329 (1952).

In 1960, the Mississippi Legislature, in an attempt to relieve the burden faced by the courts in these preliminary hearings, enacted the present section 99-13-11[48] which allows the circuit judge to appoint a psychiatrist to examine the defendant and report to the court concerning his ability to conduct a rational defense. The attempted cure of this problem in itself created new ones, as evidenced by an early interpretation of section 99-13-11 in *McGinnis v. State.*[49] In *McGinnis,* the court concluded that the statute had not changed the procedure previously established by the court but merely granted the circuit judge discretionary power to appoint a psychiatrist for the examination, leaving the ultimate determination of the facts to the jury.[50] Accordingly, the court held that since a reasonable probability of insanity had been created by the affidavits of counsel, the judge's failure to seat a preliminary jury in compliance with the statute constituted reversible error.[51] In a more recent decision, *Stevenson v. State,*[52] the court reaffirmed the *McGinnis* holding and further stated that when a reasonable probability of insanity has been created, the judge should either appoint a psychiatrist for examination or send the defendant to the Mississippi State Hospital at Whitfield for examination and evaluation.[53]

In the instant case, a unanimous court reasoned that since the psychiatric examination was no more that a one hour and fifteen minute interview of a person with whom the psychiatrist had no previous contact, and since the psychiatrist distinctly expressed the need for further examinations, the methodology used in determining the defendant's sanity was inadequate.[54] Accordingly, the court concluded that since the examination by the psychiatrist was perfunctory, the lower court committed reversible error in overruling the motion to transfer the defendant to the Mississippi State Hospital at Whitfield.[55] The court further stated that before the defendant could be tried again, he should either be sent to Whitfield for a careful and thorough examination or otherwise afforded an appropriate determination of sanity and mental competency to conduct a rational defense pursuant to section 99-13-11.[56] Although the court was divided on the separate question of criminal responsibility, Justice Broom, writing for the majority, noted that the *M'Naghten* test sufficiently protects society's needs and that the proposed Model Penal Code provision had previously been examined by the court and found to be unsatisfactory. These factors led the court to hold that the *M'Naghten* test remains the safest test proposed and, even though it is less than perfect, the test should be retained as the standard of criminal responsibility in Mississippi.[57]

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[45] *Id.* at 550, 61 So. 2d at 331; *accord,* Conn v. State, 260 So. 2d 471, 475 (Miss. 1972) (no abuse of discretion in refusing to submit incapacity issue to jury prior to trial where no reasonable probability of insanity was shown); Olsen v. State, 224 Miss. 226, 230, 79 So. 2d 841, 842 (1955) (reasonable probability of incapacity to defend rationally required preliminary submission of issue to jury).

[46] Davis v. State, 151 Miss. 883, 889-90, 119 So. 805, 806 (1928).

[47] *See, e.g.,* Robinson v. State, 223 Miss. 70, 81-82, 77 So. 2d 265, 269, *cert. denied,* 350 U.S. 851 (1955) (finding of no reasonable probability of insanity by trial court was proper use of discretion); Carter v. State, 198 Miss. 523, 528-29, 21 So. 2d 404, 404-05 (1945) (allowing question of present insanity to be raised for the first time on appeal); *cf.* Eastland v. State, 223 Miss. 195, 204, 78 So. 2d 127, 130 (1955) (addressing the issue of physical illness as an impediment to defendant's making rational defense); Williams v. State, 205 Miss. 515, 525, 39 So. 2d 3, 5 (1949) (allowing issue of present insanity to be determined in conjunction with the trial of the case). *See generally* Comment, *supra* note 15, at 75-83.

[48] Miss. Code Ann. § 99-13-11 (1972). See note 3 *supra* for the text of the statute.

[49] 241 Miss. 883, 113 So. 2d 399 (1961).

[50] *Id.* at 891, 893, 133 So. 2d at 401, 402.

[51] *Id.* at 892-93, 133 So. 2d at 402.

[52] 325 So. 2d 113 (Miss. 1975).

[53] *Id.* at 117.

In a specially concurring opinion,[58] Justice Robertson argued that the *M'Naghten* test is an archaic, outmoded and unreasonably limited formula for determining criminal responsibility and should be abandoned. Adopting in part the reasoning of the Second Circuit in *United States v. Freeman*,[59] he urged that *M'Naghten* be replaced by section 4.01 of the Model Penal Code.[60] Such a change would be advantageous because the jury would be informed of any mental defect or disease which a psychiatrist might recognize as afflicting the defendant even though testimony on these defects failed to answer the question of whether the defendant knew the difference between right and wrong.[61]

Each of the two primary issues decided in the instant case may eventually have dynamic repercussions on the insanity aspect of future Mississippi law. It can be inferred from the court's reversal on the inadequacy of the psychiatric examination that both the lower court and the supreme court confused, or allowed the psychiatrist to confuse, the separate concepts of criminal responsibility and present ability to conduct a rational defense.[62] This confusion ob-

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[54] *See* note 8 *supra* for portions of the psychiatrist's testimony. The testimony in the opinion creates some confusion and it appears that the court confused, or allowed the psychiatrist to confuse, the separate issues of criminal responsibility and present insanity. For further discussion on this point, see note 62 and accompanying text *infra*.

[55] Hill v. State, 339 So. 2d 1382, 1385 (Miss. 1976), *cert. denied*, 97 S. Ct. 1689 (1977).

[56] 339 So. 2d at 1385.

[57] *Id.*

[58] *Id.* at 1389 (Robertson, J., concurring).

[59] 357 F.2d 606 (2d Cir. 1966).

[60] MODEL PENAL CODE § 4.01(1) (Proposed Original Draft 1962). *See* note 25 *supra*.

[61] 339 So. 2d at 1388-89 (Robertson, J., concurring).

[62] See note 8 *supra*.

The pretrial examination under MISS. CODE ANN. § 99-13-11 (1972), is for the sole purpose of determining a defendant's present ability to conduct a rational defense. Yet, the testimony of the psychiatrist in the instant case continually discussed his evaluation in terms of criminal responsibility. In reversing the trial court, the supreme court relied heavily on the psychiatrist's recommendation that another opinion be taken on the deterscures the precise grounds on which the supreme court found the examination inadequate and makes a rational interpretation of the opinion difficult. Outside of this conflict, however, it may be deduced that the *Hill* court has attached a more rigorous construction to section 99-13-11's seemingly optional application.[63] Because of this construction, the court's failure to define exactly what an adequate determination of sanity would be creates a rather formidable gap in the Mississippi law of mental competency. This failure of specific definition will most likely result in continued litigation on the question of inadequate examinations until the court establishes more definite trial guidelines. One possible solution to the problem is legislative action geared toward standardization of the type of test to be given and specification of when and by whom the test should be given.[64] Such legislation should delineate the procedural guidelines to be followed in an examination to determine competency to stand trial and should specify the weight psychiatric testimony should be given by the trier of fact.[65]

Regardless of the action taken by statute, one important principle must remain consistent: any use of psychiatric testimony by the courts should remain descriptive of the defendant's condition rather than conclusory. Like criminal responsibility, the determination of competency to stand trial is properly a judicial question which must not be delegated to medical authorities.[66] The lack of judicial and legislative initiative in articulating the necessary standards leaves this area of the law unsettled with the final outcome resting on future decisions. For this reason, the court must be careful to set standards which are easily understood and readily applicable by attorneys, jurors and administrators, while continuing to provide a fair and just determination of a person's right to receive a fair trial.

Despite its affirmance of the *M'Naghten* rule, the supreme court has signaled that there is strong sentiment within the court to abandon the rule.[67] Even

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mination of criminal responsibility. Taking the court's language literally, one might infer that the court reversed on the issue of criminal responsibility as opposed to the defendant's ability to conduct a rational defense.

[63] Miss. Code Ann. § 99-13-11 (1972). See note 3 *supra* for the test of the statute. *Hill* requires that the defendant be examined at the Mississippi State Hospital or "otherwise afforded an appropriate and adequate determination of sanity." 339 So. 2d at 1385. The supreme court's failure to define what constitutes "an appropriate and adequate determination" leaves the excursion to Whitfield as the only safe alternative. However, while this alternative may be safe, it is less than desirable when viewed in terms of judicial delay and county coffers.

[64] *See, e.g.,* Mass. Gen. Laws Ann. ch. 123, § 100A (West 1969), which requires that certain classes of people be given a routine mental examination to determine mental competency and discover any disease or defects that may affect criminal responsibility. Persons indicted for capital offenses come within this requirement.

[65] *See generally* Note, *Incompetency to Stand Trial,* 81 Harv. L. Rev. 454, 461-65 (1967), which discusses some of the problems relating to admission of the accused to a mental hospital without having the opportunity to have his case heard. This procedure could result in the imprisonment of persons not guilty of any crime but merely so mentally incompetent as to prevent trial.

[66] *Id.* at 469-71.

[67] 339 So. 2d at 1386 (Robertson, J., concurring). The opinion is of special significance

the justices who voted to affirm the rule recognized its inadequacies and based their affirmation on the principle that no better rule has been proven to exist.[68] Indeed, the fact that no ideal rule exists, along with recognition that *M'Naghten* is the controlling authority in many jurisdictions,[69] gives this rationale a strong basis. Nevertheless, the special concurrence is equally well founded. In arguing for the adoption of section 4.01,[70] the concurring justices did not contend that the new rule is without fault, but rather that it is a vast improvement over a rule which has outlived its usefulness.[71] The recent rejection of *M'Naghten* in favor of section 4.01 by an impressive number of jurisdictions further enhances their argument.[72] Although the Mississippi Supreme Court has yet to reach the required majority to overrule the *M'Naghten* test, the instant case does indicate that the court is at least receptive to future argument in favor of a change. And, although the instant case does not mean that section 4.01 will inevitably replace *M'Naghten*, there are indications that section 4.01 has strong support within the court.[73] Given the present situation, it is thus apparent that even though Mississippi is quite capable of overturning *M'Naghten*, the supreme court remains in the passive position of observing the operation of new provisions in other jurisdictions. Yet, one of the enduring strengths of the common law has been its ability to change with the values of the society in which it grows.[74] The abandonment of the already decayed *M'Naghten* test would be a significant step in this direction.[75]

Thomas Marion Flanagan, Jr.

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since each of the three concurring justices had recently endorsed *M'Naghten*: (1) *Inzer*—Edmond v. State, 312 So. 2d 702 (Miss. 1975); Bean v. State, 297 So. 2d 903 (Miss. 1974); (2) *Patterson*—Bean v. State, 297 So. 2d 903 (Miss. 1974); Harvey v. State, 207 So. 2d 108 (Miss. 1968); (3) *Robertson*—Edmond v. State, 312 So. 2d 702 (Miss. 1975).

[68] 339 So. 2d at 1385.

[69] For a discussion of the prevalence of the *M'Naghten* rule in American jurisdictions, see Annot., *supra* note 12.

[70] MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962). See note 23 *supra*.

[71] 339 So. 2d at 1389 (Robertson, J., concurring).

[72] See note 24 *supra*. An attempt to discuss and contrast the vast authority criticizing or favoring one rule over another would not be practical within the scope of this Note. A synopsis of these arguments appears in United States v. Freeman, 357 F.2d 606, 613-25 (2d Cir. 1966), which involved a search for the proper standard of criminal responsibility. See notes 25 through 29 and accompanying text *supra*. *See generally* H. WIEFOHEN, *supra* note 37, at 50-129 (examining historical and current legal tests of irresponsibility).

[73] 339 So. 2d at 1386-89. The strongest argument in past cases has been for the acceptance of the irresistable impulse test. The court, however, has consistently rejected this test. *E.g.*, Herron v. State, 287 So. 2d 759, 765 (Miss.), *cert. denied*, 417 U.S. 472 (1974). *But cf.* Eatman v. State, 169 Miss. 295, 299, 153 So. 381, 381-82 (1934) (implying that the defense is available if the impulse was so strong as to prevent the accused from distinguishing right from wrong). As recognized in *Hill*, section 4.01 also adequately provides for possible cases of irresistable impulse as removing criminal responsibility. 339 So. 2d at 1385.

[74] United States v. Freeman, 357 F.2d 606, 624 (2d Cir. 1966).

[75] As Mr. Justice Cardozo stated:

> If insanity is not to be a defense, let us say so frankly and even brutally, but let us not mock ourselves with a definition that palters with reality. Such a method is neither good morals nor good science nor good law.

B. CARDOZO, *What Medicine Can Do for Law*, in LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 70, 108 (1931).

BOOK REVIEW

My Life on Trial

By Melvin M. Belli
With Robert Blair Kaiser
New York: William Morrow and Company, Inc., 1976. Pp. 342 $10.95

*Jack F. Dunbar** and *David Lail***

My Life on Trial is everything Melvin Belli ever wanted to say about himself and more. Yet, the intriguing stories behind his most famous and sometimes bizarre cases allow the reader to forgive easily the slow biographics.

The reader soon discovers that Belli makes no attempt at objectivity in describing his detractors. The lawyer pulls no punches in condemning the American Bar Association and what he describes as "establishment lawyers." The stories of Belli's constant battles with the American Bar Association are particularly interesting in light of the Supreme Court's recent decision on lawyer advertising. Certainly Belli has advertised as defined by the ethical canons of the legal profession and his attempt to disclaim ethical violations is surprisingly uncharacteristic of his admitted contempt for ABA-established legal guidelines. In fact, one sometimes wonders if Belli does not protest too much. Even so, the reader may find it more pleasurable to digest the gimmicks, tricks and "lawyering techniques," as well as the brass displayed by the author, rather than to delve into the propriety of his behavior.

Whether one agrees or not with Belli's anti-establishment views, one must admire the innovative trial techniques which he has developed and used so effectively. The reader readily perceives the obvious Belli theory: the larger the potential verdict, the more elaborate the case preparation and production.

Belli proclaims himself the "king of torts" and attributes the title to his imaginative use of demonstrative evidence. He relates, for example, the story of a $250,000 damage suit for injuries sustained by a fireman when a 12-ton tractor-trailer rammed a fire truck as it crossed an intersection. To demonstrate for the jury that the driver of the tractor-trailer should have heard the siren and allowed the fire truck to pass, Belli arranged for a fire engine to drive past the court room, its siren screaming at full blast, during his closing argument. The jury brought in a verdict of $225,000 which, at that time, Belli says, was the highest award ever given to a single plaintiff in any personal injury suit.

The author also tells of the amputation case in which he left an L-shaped package, which appeared to contain the amputated limb itself, atop his counsel table throughout the trial. During his closing argument, he slowly unwrapped the package and handed the jury a prosthetic leg which the young plaintiff was to wear for the rest of her life. The case was tried in 1941, and the jury brought back a verdict of $100,000.

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Belli even explains how he manipulated a judge into becoming his unwitting advocate. While explaining the damages to the jury, Belli purposefully misadded the figures on a blackboard, and as he had hoped, the judge corrected him, saying:

> You've made a mistake in your mathematics. I think if you take forty-four times one hundred fifty a month, you will get the sum of seventy-nine thousand two hundred dollars instead of sixty-six thousand dollars. Forty-four times eighteen hundred a year comes to seventy-nine thousand two hundred dollars. The young man should get seventy-nine thousand two hundred dollars.[1]

My Life on Trial is entertaining and at its conclusion the reader may be convinced that almost everything Belli has claimed about Belli either is true or close enough to say that it is true. Anyway, nothing makes the truth so shabby as a magnificent overstatement.

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[1] M. BELLI, MY LIFE ON TRIAL 114 (1976).

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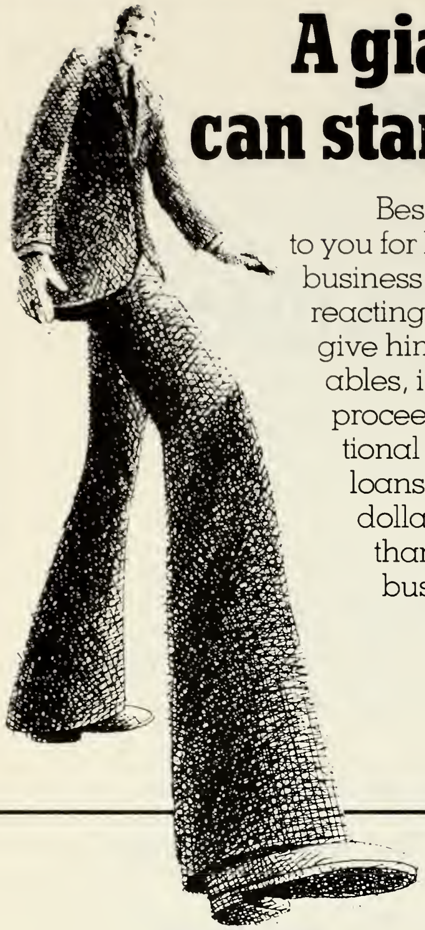

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